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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 481

GUY A. THOMPSON, TRUSTEE, MISSOURI-ILLINOIS RAILROAD COMPANY, DEBTOR, PETITIONER,

vs.

MAGNOLIA PETROLEUM COMPANY AND THE OHIO OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 23, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

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[fol. a] [Caption omitted]

[fol. 1] Citation and service on Appeal of Magnolia Petroleum Company, dated December 12, 1938, omitted in printing.

[fol. 2] Citation and service on Appeal of Ohio Oil Company, dated December 12, 1938, omitted in printing.

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

PETITION OF TRUSTEE FOR DETERMINATION OF TITLE AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT-OF-WAY NEAR SALEM, ILLINOIS—Filed November 1, 1938.

[Petition No. 1167]

[fol. 3] In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 6935

Comes now Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, and presents to the Court:

That by petition duly filed and approved in these proceedings June 30, 1933, Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the laws of the State of Missouri and doing business in the State of Illinois, became a subsidiary debtor in these proceedings under the provisions of Section 77 of the Bankruptcy Act, and the undersigned is now the duly appointed, qualified, and acting trustee of said subsidiary debtor.

That by orders heretofore entered in these proceedings (Order No. 122, Rec. p. 789, and Order No. 407, Rec. p. 3157), Trustee has been granted blanket authority to enter into gas and oil leases and to contract for the drilling of

oil wells on the rights-of-way of the various debtor companies. The right-of-way of the Missouri-Illinois Railroad now traverses certain territory in the State of Illinois where oil deposits under the ground have been proved to exist in paying quantities. Trustee has accordingly solicited bids for lease of oil rights upon that part of the right-of-way of the Missouri-Illinois Railroad which ranges from 60 to 66 feet in width and extends diagonally northeast to southwest across the Northeast Quarter and the South-east Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section 20, Township 2 North, Range 2 East of the third principal meridian, Salem Township, Marion County, Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

Certain oil companies claiming to own title to the oil and mineral rights in and underlying said premises (to-wit, The Ohio Oil Company, with offices at Findley, Ohio, the Kingwood Oil Company, with offices at Mattoon, Illinois, and the Magnolia Oil Company, with offices in Magnolia Building, Dallas, Texas), have served notice upon Trustee [fol. 4] questioning Trustee's right and title to the oil in and under said right-of-way, and Trustee is advised and believes that there may be other parties, unknown by name to Trustee, who now contend or will contend that they own certain interest in portions of the oil, gas and mineral rights underlying said right-of-way, and because of these possible adverse claims, Trustee now seeks advice and directions of the Court in the premises.

Missouri-Illinois Railroad Company, by conveyances and decrees of record, had, at the time it became a subsidiary debtor in these proceedings as aforesaid, and Trustee has now, duly succeeded to all of the title to the lands hereinafter described originally vested in The Centralia & Chester Railroad Company, a predecessor railroad company heretofore owning and operating the line of railroad in Marion County, Illinois now owned and operated by petitioner as Trustee, and in addition thereto, petitioner and Missouri-Illinois Railroad Company own such additional rights to the property hereinafter described as have been acquired through adverse possession.

Title of The Centralia & Chester Railroad Company to the property in question is traced back to the following conveyances, to-wit:

Warranty Deed, dated Januar 28, 1898, recorded November 5, 1900, at page 533 in Volume 60 of Record of Deeds, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of $300.00 to The Centralia & Chester Railroad Company, the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground for right of way for said Company Sixty feet wide over and across The North half (½) of the North East quarter (¼) of Section Twenty (20), Town Two (2) North, Range Two (2) East of the third principal Meridian, where said Railroad is now located."

Warranty Deed, dated August 13, 1896, recorded November 19, 1897, at page 261 in Volume 55 of Record of Deeds, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of $150.00, conveyed to The Centralia & Chester Railroad Company, [fol. 5] the following described real estate in Marion County, Illinois, to-wit:

"'A strip of Land for right of way for said Railroad Company Sixty feet wide over and across the South West quarter (¼ of the North East quarter (¼) of Section Twenty (20) Town Two (2) North, Range Two (2) East of the third principal Meridian."

Warranty Deed, dated August 14, 1896, recorded Novemr 19, 1897, at page 260 in Volume 55 of Record of Deeds, Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of $100.00, conveyed to The Centralia & Chester Railroad Company the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground Sixty six (66) feet wide for Right of way for said Railroad Company over and across the East half (½) of the North West quarter (¼) of the South West Quarter (¼) of Section Twenty (20) in Township Two (2) North, Range Two (2) East of the third principal Meridian."

Warranty Deed, dated January 3, 1898, recorded January 25, 1898, at page 577 in Volume 56 of Record of Deeds, Marion County, Illinois, wherein Caroline Rusler, a widow,

for the consideration of $120.40, conveyed to The Centralia & Chester Railroad Company, the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground for right of way for said Company Sixty feet (60) wide over and across the South East Quarter (¼) of the North East quarter (¼) and the West half (½) of the North West quarter (¼) of the South West Quarter (¼) and the South East quarter (¼) of the North West (¼) Quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the third principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located."

Within a short time after the conveyances aforesaid and thereafter down to the present time, the aforesaid lands so conveyed, so Petitioner is advised and believes, have been fenced and used by Trustee and his predecessors in [fol. 6] interest without interruption, and with actual visible and exclusive possession acquired under claim of title inconsistent with the claims of title of any other owner for at least 20 years prior to institution of these proceedings.

Petitioner is advised and believes, and therefore avers, that as Trustee, Missouri-Illinois Railroad Company, Debtor, he is now lawfully vested with title to all of the oil and mineral rights under the land herein referred to.

Petitioner is advised and believes that numerous oil wells have been drilled in close proximity to Trustee's right-of-way, and that unless prompt action be taken to remove the oil underlying said right-of-way, it will be drained into the wells on adjacent lands, and the value thereof will be forever lost to the stockholders and creditors of the Missouri-Illinois Railroad Company.

This court of bankruptcy, by reason of Trustee's possession of said property, has jurisdiction, under Section 77 of the Bankruptcy Act, to determine all questions respecting title thereto, and pending the determination of said title, has jurisdiction to instruct and direct Trustee to take such action as the Court may deem advisable to prevent the waste of said oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined, and has authority to direct that the expenses thereof be paid out of the proceeds of the oil so recovered. It is not, in the opinion of Trustee, practicable

or advisable to await the adjudication of adverse claims and the possible review of this Court's decision respecting title before beginning the drilling for oil upon said right-of-way.

After a careful analysis of the various bids hereinabove referred to, and having due regard for financial backing, experience, and reputation of the bidders, and the terms and conditions offered, Trustee is advised and believes that the bid most favorable to the trust estate is that made by the Blackstock Oil Company.

Subject to the approval of this Court, Trustee has therefore negotiated a contract with Blackstock Oil Company, copy of which is filed herewith as "Exhibit A", which con- [fol. 7] tract, because of the adverse claims to title, has been divided into three parts or articles, to-wit:

Article I is applicable pending determination by this Court of petitioner's title to the premises in question, and is further applicable pending appeal, if appeal be taken. It provides, among other things not herein set out, the number and description of the wells to be drilled, the conditions safeguarding continued operation of the railroad, conditions respecting claims and damages and requiring public liability insurance, provisions respecting operation of the wells, marketing of the oil, and payment of the proceeds over to Trustee, and with respect to the consideration to be paid by Trustee to Contractor therefor provides:

"(1) Drilling and Equipment Cost

a. Price per foot depth of well	$3.25
b. Well connections and flow lines in place, lump sum per well	350.00
c. Necessary grading of temporary roads and cleaning up around well site, lump sum per well	200.00
d. Trucking expense incident to drilling and completing the well, lump sum per well	200.00

e. Actual invoice cost of:

Surface pipe,
Casing pipe,
Cementing surface-pipe and casing,
Rental of cable tools at $5.00 per hour based on actual hours in use,
Tubing,

Tanks and separator,
Public liability.

f. 10 per cent for accounting and supervision.

The total estimated cost of completing well, exclusive of pumping unit and appurtenances, is $12,800 to the Benoist Sand, and $14,400 to the McCloskey Limestone.

[fol. 8] "(2) Operating cost of producing oil after drilling is completed

a. $25.00 per month per well to cover cost of accounting and bookkeeping at our main office and in the field.

b. Invoice cost of rods, working barrel, pump unit with engine, including necessary connections and fittings at such time as wells cease to flow.

c. 15¢ per barrel on all oil produced for all other operating costs of production.

"(3) Gathering and marketing cost

a. Actual cost, plus 10 per cent for the installation, maintenance and operation of facilities required for gathering the oil from the wells tanks and loading the oil in tank cars. Should oil be delivered to pipe line, no facilities will be required.

b. Actual transportation expense from loading track to destination.

c. Actual cost of sales organization necessary to dispose of the oil up to a maximum of $500.00 per month.

d. All State or Federal taxes on production or marketing of oil.

"(4) Interest at the rate of six (6) per cent per annum on the amount of any payment due Contractor hereunder and not paid to Contractor within sixty (60) days after Contractor's submission of bill and necessary supporting invoices."

Article II is in the nature of an oil and gas lease, and is intended to be applicable retroactively from the date of the contract in the event Trustee's title to the premises be upheld by this Court, and in such event it is to supersede the provisions of Article I, and payments theretofore made

under Article I are to be credited and readjusted to conform with the provisions of Article II. Article II, like the preceding article, provides, among other things not herein set out, the term of the lease, the number and description of wells to be drilled, conditions safe-guarding continued operation of the railroad, conditions respecting claims and damages and the giving of public liability insur-[fol. 9] ance, and with respect to the consideration to be paid by Lessee to Trustee provides:

"In consideration of the premises, Lessee covenants and agrees during the entire term hereof:

"(a) To deliver to the credit of Lessor, free of cost, in the pipe line to which each well on this lease is connected, or in tank cars in which such oil is loaded for transportation, the equal twenty nine-sixty fourths (29/64th) part of all oil produced, saved and marketed from the leased premises, provided Lessee can produce and sell from all producing wells on the leased premises an average of more than thirty (30) barrels per well per day; and twenty two-sixty fourths (22/64) of all oil produced and saved from the described premises, if Lessee produces and sells from all producing wells an average of thirty (30) barrels or less per well per day; it being understood and agreed by and between the parties hereto that in arriving at the average per well per day basis for any period during the term of this lease that it will be based upon a pipe line month, said pipe line month not to exceed thirty-one (31) days, that is to say, each month Lessee is able to produce and sell an average of more than thirty (30) barrels of oil per well per day, Lessor shall receive said twenty nine-sixty fourths (29/64) of the oil produced and sold from said premises and that any month during the life of said lease the Lessee is not able to produce and sell from said wells an average of more than thirty (30) barrels of oil per well per day, then for each month Lessor shall receive twenty two-sixty fourths (22/64) of the oil produced and sold from said premises during such month;

"(b) To pay Lessor for gas produced from any well, including that used for the manufacture of casinghead gasoline, the equal twenty nine-sixty fourths (29/64) part of the gross proceeds realized from the sale thereof so long as Lessee has been able to produce and sell from said prem-

ises said average of more than thirty (30) barrels of oil per day per well during the month and the equal twenty two-sixty fourths (22/64) part of the gross proceeds realized from the sale of said gas and casinghead gasoline during such months that the Lessee has not been able to produce and sell an average of thirty (30) barrels of oil per well per [fol. 10] day; it being further understood and agreed by and between the parties hereto that any sale of gas or casinghead gasoline will be pursuant to the terms and conditions of an agreement with the purchaser of such gas having mutual approval of the parties hereto; and

"(c) To store and market, free of expense to Lessor, all royalty oil produced hereunder in the same manner as it stores and markets its own oil, whenever Lessor does not elect to take the same in kind, obtaining therefor the posted price prevailing in this field from day to day for oil of like kind and character, or at such other and different price or prices as shall have been approved, from time to time, by Lessor in writing; such payments to be made to Lessor at Lessor's Office in St. Louis, Missouri, on or before the fifteenth (15) day of the month succeeding such production."

Article III, which is self-explanatory, provides:

"In the event that Principal's title to oil rights on the premises in question be upheld in part and rejected in part by final decree of the United States District Court for the Eastern Division, Eastern Judicial District of Missouri in proceedings more fully described in Article I hereof, and be affirmed on appeal, if appeal be taken thereupon, if either party to this contract is of the opinion that a fair and equitable disposition of the rights of the contracting parties with respect to the oil rights that have been sustained requires some modified application of the provisions of Article II, then the parties hereto shall attempt to agree upon such modified terms and conditions so as to meet such exigencies and equities of the situation, and failing to agree, shall present their differences to the administrative judge in the aforesaid proceedings and shall abide by his determination as to what is fair and equitable, with due regard for the intents and purposes of the agreement of lease expressed in Article II of this agreement, and with due regard for changes therein made necessary by any defects in title. Any such agreement or ruling of the Court with respect

thereto shall, in so far as possible, be retroactively applicable from the date of this agreement, and accounting shall be adjusted pursuant to such agreement or ruling of the Court."

[fol. 11] Wherefore, Trustee respectfully recommends:

(1) That this Court issue its subpoena to The Ohio Oil Company, to the Kingwood Oil Company, and to the Magnolia Oil Company, and by such publication or other notice as the Court may direct addressed to any other adverse claimant, require that they and each of them appear and file written return, upon a day to be fixed by the Court, showing cause, if any they have, why this Court should not find and decree that all oil, gas and mineral rights in and under the aforesaid right-of-way, in and across the aforesaid Section 20, Township 2 North, Range 2 East, Salem Township, Marion County, Illinois, are now vested in petitioner as Trustee, Missouri-Illinois Railroad Company, Debtor, and directing that upon failure to show such cause, they be estopped and enjoined from asserting any further title in and to the land over and upon which said right-of-way is located or to the mineral, oil or gas deposits in and under said right-of-way or extracted therefrom.

(2) That Trustee be authorized to forthwith execute contract with Blackstock Oil Company substantially in the form of Exhibit A filed herewith, and, as therein provided, to make advances and payments out of funds in petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to otherwise carry out the terms and conditions of said contract.

(3) That Trustee, pending determination of adverse claims to title, be authorized to sell and convey and to transfer title to any oil or gas removed from the aforesaid premises free and clear of all liens or claims of others predicated upon alleged adverse ownership of any rights in said premises.

(4) That Trustee be directed to keep separate account of the expense of drilling each well, and to keep separate account of all oil and gas removed from each separate tract to which adverse claim is herein asserted, and that Trustee, after paying the expense provided for in Article I of the contract herewith filed as Exhibit A, and such other ex-

penses as may be reasonably necessary in removing, conserving, and marketing the oil or gas from said premises, reimburse himself therefor out of the proceeds of the sale [fol. 12] of said oil and/or gas, and that Trustee be directed to hold the remainder of said proceeds for the account of whom concerned as may hereafter be determined by appropriate orders of this Court.

(5) That this Court enter such further order and grant such further relief as may by the Court be determined to be proper in the premises.

Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor; Russell L. Dearmont, Counsel for Trustee.

Duly sworn to by Guy A. Thompson. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

This Agreement, executed in duplicate this — day of ——, 1938, by and between Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, as trustee and not individually, with offices in Missouri Pacific Building, St. Louis, Missouri, (hereinafter called Principal), and Blackstock Oil Company, a corporation duly organized under the laws of the State of Oklahoma, with principal office in Milam Building, San Antonio, Texas, (hereinafter called Contractor), Witnesseth:

Whereas, Principal now owns or asserts fee title to the following described lands, situated in Marion County, Illinois, herein sometimes called "Premises" or "leased premises" and located substantially where shown by yellow lines [fol. 13] on Principal's blue print File No. 9-8702, dated October 1, 1938, marked Exhibit A, attached hereto as part hereof, to-wit:

A strip of land sixty (60) feet wide, thirty (30) feet on each side of the center line of main track of said Principal, over, through and across the NE¼, and the SE¼ of the NW¼, and the W½ of the NW¼ of the SW¼ of Section 20, Township 2 North, Range 2 East of the Third Principal Meridian; also a strip of land sixty-six (66) feet wide, thirty-three (33) feet on each side of said center line, over,

through and across the E½ of the NW¼ of the SW¼ of said Section 20.

Principal owns or asserts title to all the minerals in Premises and to all or all portions of minerals in Premises in and to which title adverse to Principal is now being asserted by the Ohio Oil Company, Kingwood Oil Company, and Magnolia Oil Company, severally, and the parties hereto are advised that there may be other adverse claimants in and to said minerals whose names and alleged interests are at present unknown.

Pending determination of Principal's title in and to said minerals, and in the event of a decision adverse to Principal with respect to said title, it is the desire of the parties hereto to be governed by the provisions of Article I of this agreement.

In the event Principal's title to the said minerals shall be upheld, then it is the desire of the parties hereto to be governed, retroactively from the date of this agreement, by the provisions of Article II of this agreement.

In the event Principal's title to the said minerals shall be upheld in part and denied in part, then it is the desire of the parties hereto to be governed, retroactively from the date of this agreement, by the provisions of Article III hereof.

Now, Therefore, in consideration of the premises, and of the mutual covenants hereinafter contained, by each of the parties hereto to be kept and performed, the parties hereto have covenanted and agreed and do hereby covenant and agree as follows:

[fol. 14] Article I

1. Pending determination of Principal's title to said minerals, pursuant to a Petition filed or to be filed by Principal in Cause No. 6935 pending in the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, entitled 'In the Matter of Missouri Pacific Railroad Company, Debtor, In Proceedings for the Reorganization of a Railroad'' and pending final determination of any ruling of said Court with respect to said title, on appeal:

(a) Contractor, furnishing all necessary instrumentalities, labor, materials, supplies and insurance, without cost or expense to Principal other than the remuneration

to be paid Contractor by Principal as expressed in paragraph (o) of this Article I, shall, and Contractor hereby agrees, to commence, within fifteen (15) days from the date of this agreement, operations for drilling an oil or gas well on Premises, and to prosecute such drilling operations with diligence and in a workmanlike manner until such well shall be completed to the Benoist Sand underlying Premises, unless oil or gas is found in paying quantities at a lesser depth. If operations are not so commenced and not so continued, then all rights of Contractor hereunder shall cease and terminate.

(b) Further, within fifteen (15) days after such first well is completed, Contractor agrees to commence and to continue to drill a second well in like manner and to like depth, and thereafter to continue to drill other wells, but not less than six (6) other wells on the Premises to the Benoist Sand, and so that no more than fifteen (15) days shall elapse between the completion of any one well and the beginning of another. If operations are not so begun and diligently continued, then all rights of Contractor hereunder shall cease and terminate.

(c) Further, Contractor shall and hereby agrees to proceed, with diligence and dispatch and in a workmanlike manner to drill and complete at least one well to the depth of any oil producing horizon underlying Premises, such drilling to be commenced by Contractor within fifteen (15) days after the completion of a commercial producing oil well to such [fol. 15] producing horizon on any forty (40) acres in which any part of Premises is located; provided that Contractor shall not be required to drill more than (5) wells to develop the property to the "McCloskey" horizon underlying Premises. No well shall be drilled to and operated from more than one producing horizon without the consent in writing of Principal's Chief Engineer.

(d) Contractor agrees fully to protect the boundary lines of Premises by promptly drilling opposite any commercial producing oil well within 330 feet of the boundary lines of Premises, and within ten (10) days from the completion of such well, or, if a well is then being drilled on Premises within ten (10) days from the completion of such well then being drilled on Premises, Contractor shall commence the drilling of the necessary offset well hereun-

der, unless such location has already been drilled or condemned; it being understood and agreed that in no event shall Contractor be required to have more than four (4) offset drilling operations on Premises at any one time and that Contractor shall not be required to drill a total of more than seven (7) offset wells to the Benoist Sand in addition to the eight (8) wells required to be drilled, completed and operated pursuant to the provisions of sub-paragraphs (a) and (b) of this Paragraph 1. Contractor shall not be required to drill a total of more than four (4) offset wells to the McCloskey horizon in addition to the five (5) wells required to be drilled, completed and operated pursuant to the provisions of sub-paragraph (c) of this Paragraph 1.

(e) All operations by Contractor hereunder shall be according to the following terms and conditions:

(1) Wells, pipe lines, and all other structures and equipment shall be located by Contractor on the Premises only at such places as shall be approved from time to time in advance by Principal's Chief Engineer in writing.

(2) Contractor agrees at all times to conduct its operations hereunder in conformity with the requirements of Federa' State, County and Municipal authority, and to comply with all valid rules and regulations of the Illinois Commerce Commission.

(3) Contractor shall not complete any well on the Premises without notifying Principal's Chief Engineer at [fol. 16] St. Louis, by telegraph at least twenty-four (24) hours before such completion, and Contractor agrees to carry out such completion only during such period as may be specifically designated by Principal after receiving said telegraphic notice. Contractor shall drill and complete all wells on the Premises with every possible precaution and in the most approved manner, so as to avoid all risk of explosion, fire or other catastrophe, and so as not to interfere with the safe and convenient operations of Principal. After completion, all producing wells shall, where practicable, be enclosed in sheet-iron houses, and the same shall be kept securely locked.

(4) Contractor agrees to keep the Premises at all times clean and safe from waste oil, and to store all oil produced

hereunder a sufficient distance from the Premises to insure safe operation of trains thereover, and to take all possible precautions against hazard of fire, explosion or other catastrophe.

(5) Contractor agrees not to shoot, treat or rework any well on the Premises without notifying Principal's Chief Engineer at St. Louis, Mo., by telegraph at least twenty-four (24) hours in advance, and to carry out such operations only during such period as Principal may specifically designate after receiving said telegraphic notice. Contractor further agrees to use every possible precaution and the most approved methods in carrying out such operations, so as to avoid all risk of fire, explosion or other catastrophe, and so as not to interfere with the safe and convenient operations of Principal.

(6) Contractor agrees that it will not interfere with the telegraph, telephone and signal lines, or other structures, upon the Premises, or with the operation of said facilities. In case Principal's Superintendent, in writing, after written application of Contractor, approves the movement or rearrangement of any of said facilities, to permit of Contractor's operations under this lease, the work shall be done or caused to be done by Principal at Contractor's cost, and Contractor on rendition of bills shall reimburse and pay to Principal the cost of said work, including the Principal's then customary charges and surcharges for labor and material and, also, for use of equipment em- [fol. 17] ployed on the work and excise taxes on labor and materials.

(7) Contractor hereby agrees that it will not interfere with the use and occupancy of the Premises by Principal or anyone thereon by Principal's authority, nor with the property thereof, and will promptly pay any damages resulting from its failure so to do.

(8) Any storage tank, flow tank, oil sump or separator shall be built or installed by Contractor only at such place on Premises as shall be approved, in writing, by Principal's Chief Engineer.

(f) Contractor hereby releases and discharges Principal, Principal's tenants and invitees, from all liability because of any loss of or damage to Contractor's property, or of

others in its possession, delay to Contractor's operations, and injury to or death of Contractor's employes, and Contractor will indemnify and save Principal harmless from and against all actual expenses and claims because of loss of or damage to property, including that of Principal, or of others in Principal's possession or on Principal's property, and because of injury to or death of persons, including Principal's employes and passengers on Principal's trains, and Principal's tenants and invitees and their employes, growing out of, arising from, or in any way incident or attributable to the operations of Contractor, whether such loss, damage, injury or death be caused or contributed to by negligence or otherwise, and will promptly repay any sum or sums which Principal, Principal's tenants and invitees, may pay or be compelled to pay, and discharge any judgment or judgments that may be rendered against Principal, Principal's tenants and invitees, including all costs and attorney's fees, because of any such claim or claims. No other provision of this contract shall be construed to waive or limit the liability of Contractor as defined in this paragraph.

(g) Contractor further agrees at Contractor's own expense to carry insurance at all times in a company or companies approved by Principal, protecting Principal, Principal's tenants and invitees, and Contractor against the [fol. 18] liability involved in the next preceding paragraph, with limits of $50,000.00 for one person and $100,000.00 for one accident for personal injuries, and $50,000.00 for property damage, and to furnish Principal true original counterparts of such policies and have Principal's written approval of said policies at least forty-eight (48) hours before entering the said Premises hereunder.

(h) Contractor further agrees to at all times, at Contractor's own cost and expense, defend, fully indemnify and save harmless the Principal, Principal's successors and assigns, from all claims, damages, actions or causes of action arising or in any manner growing out of the operations of Contractor in the production or removal of oil in, on or from the Premises.

(i) Contractor further agrees that Contractor will not create, suffer or permit the creation of any lien, either contractual, constitutional, statutory, or of any other sort whatsoever, on the Premises hereby leased, or on any part

thereof, or on any tools, casing, pipe or other equipment of any sort whatsoever used or about to be used on the Premises.

(j) It is understood and agreed that neither any of the duties and responsibilities nor any of the rights, of Contractor hereunder, shall be transferred or assigned by Contractor in whole or in part except with written consent of Principal. The appointment of a receiver or a trustee in bankruptcy for Contractor, shall be construed to be a violation of the covenant against assignment.

(k) Contractor covenants and agrees, at all times during the term hereof, and as one of the considerations for the remuneration to be paid Contractor by Principal pursuant to the provisions of this Article I, (a) to deliver in the pipe line to which each well on Premises is connected, or in tank cars in which oil is loaded for transportation, all of the oil produced and saved from Premises, (b) to market, sell and dispose of all of the said oil and all gas, including that used for the manufacture of casinghead gasoline, produced hereunder, obtaining therefor the posted price prevailing in this field from day to day for oil of like kind and character, and the highest prevailing market [fol. 19] price paid from day to day for gas produced, including that used for the manufacture of casinghead gasoline, provided, however, that the said oil, gas, or gas used for the manufacture of casinghead gasoline, may be sold by the Contractor at such other and different price or prices, from time to time, as shall have been approved by Principal in writing, and (c) to pay to Principal on or before the fifteenth (15th) day of each month the amount of the gross proceeds realized from the sale of the oil produced hereunder during the preceding month, and on the twentieth (20th) day of each month the amount of the gross proceeds realized from the sale of gas, including that used for the manufacture of casinghead gasoline, produced hereunder during the preceding month; and it is expressly agreed that any payments not so made to Principal, within ten (10) days after such fifteenth (15th) day or within twenty (20) days after such twentieth (20th) day, as the case may be, shall bear interest at the rate of six per cent (6%) per annum from such due date until paid, but this provision shall in no manner waive or extend the specific due dates of such payments.

It is expressly understood and agreed that if any oil owned by or held for the account of Principal is to be sold in any manner that will require shipment in interstate commerce via Missouri-Illinois Railroad such sales shall provide for and be conditioned upon delivery to and acceptance by the purchaser or purchasers of such oil at the point of shipment on Missouri-Illinois Railroad, and none of said oil shall be sold on a delivery basis.

(l) Contractor shall have the free use of oil and gas for all of Contractor's operations hereunder on the Premises.

(m) Contractor shall furnish Principal with the logs of all wells drilled by Contractor hereunder. Actual production from each quarter Section in which any part of Premises is located shall be kept and reported separately. Principal's authorized representatives shall at all reasonable times during office hours have access to Contractor's books and records relating to the production, sale and delivery of oil and gas under the provisions of this agreement.

[fol. 20] (n) Should Contractor fail in any manner to perform any of the Contractor's obligations herein provided for, then at the option of Principal, after five (5) days written notice, mailed to Contractor at Milam Building, San Antonio, Texas, or delivered to any employe of Contractor, of the grade of foreman, or above, on Premises, and Contractor's failure to correct the matter complained about, Principal may declare this contract terminated in its entirety, but without prejudice to any accrued liability.

(o) For all operations, services, costs and expenses incurred or assumed by Contractor in or in connection with Contractors' performance of Contractor's undertakings as in this Article I expressed and set forth, during each calendar month of term hereof, Principal shall pay to Contractor and Contractor accept, on or before the fifteenth (15th) day of the next succeeding calendar month, payments to be determined as follows, to-wit:

(1) Cost of Each Well Completed During Such Calendar month.

a. Price per foot depth of well	$3.25
b. Well connections and flow lines in place, lump sum per well	350.00

c. Necessary grading of temporary roads and cleaning up around well site, lump sum per well 200.00

d. Trucking expense incident to drilling and completing the well, lump sum per well 200.00

e. Actual invoice cost of:

Surface pipe,

Casing pipe,

Cementing surface pipe and casing,

Rental of cable tools at $5.00 per hour based on actual hours in use,

Tubing,

Tanks and separator,

Public liability.

[fol. 21] f. 10 per cent for accounting and supervision.

(2) Operating Cost of Producing Oil After Drilling Is Completed.

a. $25.00 per month per well to cover cost of accounting and bookkeeping at Contractor's main office and in the field.

b. Invoice cost of rods, working barrel, pump unit with engine, including necessary connections and fittings at such time as wells cease to flow.

c. 15¢ per barrel on all oil produced for all other operating costs of production.

(3) Gathering and Marketing Cost.

a. Actual cost, plus 10 per cent for the installation, maintenance and operation of facilities required for gathering the oil from the well tanks and loading the oil in tank cars. Should oil be delivered to pipe line, no facilities will be required.

b. Actual transportation expense from loading track to destination, subject to the provisions of sub-paragraph (k) of Paragraph 1 of this Article I.

c. Actual cost of sales organization necessary to dispose of the oil up to a maximum of $500.00 per month.

d: All State or Federal taxes on production or marketing of oil.

(4) Interest at the rate of six per cent (6%) per annum on the amount of any payment due Contractor hereunder and not paid to Contractor within sixty (60) days after Contractor's submission of bill and necessary supporting invoices.

Article II

In the event Principal's title in and to the said minerals be upheld by final decree of the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, in the Proceedings more fully referred to in Article I hereof and such title be affirmed on appeal, if appeal be taken, then, retroactively from the date of this agreement, and superseding the covenants and agreements of the Prin-
[fol. 22] cipal and Contractor as in Article I hereof expressed and set forth, Principal, hereinafter in this Article II referred to as "Lessor", and Contractor, hereinafter in this Article II referred to as "Lessee", mutually covenant and agree, as follows:

1. Lessor, acting pursuant to Orders of the United States District Court, Eastern Division, Eastern Judicial District of Missouri, in Cause No. 6935 pending in said Court, entitled "In the Matter of Missouri Pacific Railroad Company, et als., Debtor,". in consideration of Fifty Dollars ($50.00), cash in hand paid by Lessee, and of other valuable considerations, of the royalties hereinafter provided and of the agreements of Lessee hereinafter contained, subject to the further provisions hereof, hereby grants, leases, and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling, mining for and producing oil and gas, laying pipe lines and building structures thereon to provide, save, take care of, transport and own said products, the following described lands situated in Marion County, Illinois, herein sometimes called "leased premises" and located substantially where shown by yellow lines on Lessor's blue print File No. 9-8702, dated October 1, 1938 marked Exhibit A, attached hereto as part hereof, to-wit:

A strip of land sixty (60) feet wide, thirty (30) feet on each side of the center line of main track of said Lessor, over, through and across the NE¼, and the SE¼ of the NW¼, and the W½ of the NW¼ of the SW¼ of Section 20, Township 2 North, Range 2 East of the Third Principal Meridian; also a strip of land sixty-six (66) feet wide, thirty-three (33) feet on each side of said center line, over, through and across the E½ of the NW¼ of the SW¼ of said Section 20,

save and except therefrom such part thereof as may from time to time be used for railroad purposes.

2. Subject to the provisions herein contained, this grant shall remain and continue in full force and effect for a term of sixty (60) days from the date of entry of the aforesaid final decree, subject to extension by Lessor for causes beyond Lessee's control, and so long as continuous drilling operations are prosecuted as hereinafter provided and only [fol. 23] so long thereafter as oil or gas is produced from the leased premises in paying quantities.

3. It is understood and agreed that any and all producing oil wells which shall have been drilled on the leased premises by Lessee while acting as Contractor pursuant to the provisions of Article I of this agreement, shall to the extent of the number, location and character thereof be deemed and held to be fulfillment, pro tanto, by Lessee of Lessee's obligations under paragraphs 4, 5, 6 and 7 of this lease, and, subject to such pro tanto allowance and credit for the producing oil wells so drilled, Lessee shall and hereby agrees to keep and perform all of Lessee's covenants and agreements in said paragraphs 4, 5, 6 and 7 expressed and set forth.

4. Lessee agrees to commence operations for drilling an oil or gas well on the leased premises within fifteen (15) days from the effective date of this lease, as expressed in paragraph 2 hereof, subject to extension by Lessor for causes beyond Lessee's control, and to prosecute such drilling operations with diligence and in a workmanlike manner until such well shall be completed to the Benoist Sand underlying the leased premises. If operations are not so commenced, and not so continued, then all rights of Lessee hereunder shall cease and terminate, and Lessee shall have no further rights in the leased premises.

5. Further, within fifteen (15) days after such first well is completed, Lessee agrees to commence and to continue to drill a second well in like manner and to like depth and thereafter to continue to drill other wells, but not less than six (6) other wells on the leased premises to the Benoist Sand, and so that no more than fifteen (15) days shall elapse between the completion of any one well and the beginning of another. If operations are not so begun and diligently continued, then all rights of Lessee hereunder shall cease and terminate, and Lessee shall have no further right in the premises; provided, however, that any such default by Lessee shall not affect Lessee's rights in and to any well or wells previously completed hereunder, but Lessee shall retain such well or wells subject to the other terms and conditions hereof, together with an area around each such producing well which measures not more than 50 feet [fol. 24] perpendicular to the center line of Lessor's main railroad track, shown on Exhibit "A", and 150 feet parallel to the center line of said main railroad track but not exceeding 75 feet on each side of the well, such area in no event extending across the center line of the main railroad track or beyond Lessor's property limits.

6. Further, Lessee shall and hereby agrees to proceed with diligence and dispatch and in a workmanlike manner to drill and complete at least one (1) well to the depth of any oil producing horizon underlying the leased premises, such drilling to be commenced by Lessee within fifteen (15) days after the completion of a commercial producing oil well to such producing horizon on any forty (40) acres in which any part of the leased premises is located; provided that Lessee shall not be required to drill more than five (5) wells to develop the property to the McCloskey horizon underlying the leased premises. No well shall be drilled to and operated from more than one producing horizon without the consent in writing of Lessor's Chief Engineer.

7. Lessee agrees fully to protect the boundary lines of the leased premises by promptly drilling opposite any commercial producing oil well within 330 feet thereof, and within ten (10) days from the completion of such well, or, if a well is then being drilled on the leased premises, within ten (10) days from the completion of such well then being drilled on the leased premises, Lessee shall commence the drilling of the necessary offset well hereunder, unless such

location has already been drilled or condemned; it being understood and agreed that Lessee shall not be required to have more than four (4) offset drilling operations on the leased premises at any one time and that Lessee shall not be required to drill a total of more than seven (7) offset wells to the Benoist Sand in addition to the eight (8) wells required to be drilled, completed and operated pursuant to the provisions of paragraphs 4 and 5 of this Article II. Lessee shall not be required to drill a total of more than four (4) offset wells to the McCloskey horizon in addition to the five (5) wells required to be drilled, completed and operated pursuant to the provisions of paragraph 6 of this Article II. If such drilling operations are not so commenced and diligently continued, then all rights of Lessee [fol. 25] hereunder shall cease and terminate, and Lessee shall have no further rights in the leased premises; provided, however, that any such default by Lessee shall not affect Lessee's rights in and to any well or wells previously completed on the leased premises, but Lessee shall retain such well or wells subject to the other terms and conditions hereof, together with an area around ~~each such~~ producing well which measures not more than 50 feet perpendicular to the center line of the aforesaid main railroad track, and 150 feet parallel to the center line of said main railroad track, but not exceeding 75 feet on each side of the well, such area in no event extending across the center line of the main railroad track or beyond Lessor's property limits.

8. All operations by Lessee hereunder shall be according to the following terms and conditions:

(a) Wells, pipe lines, and all other structures and equipment shall be located by Lessee on the leased premises only at such places as shall be approved from time to time in advance by Lessor's Chief Engineer in writing.

(b) Lessee agrees at all times to conduct its operations hereunder in conformity with the requirements of Federal, State, County and Municipal authority, and to comply with all valid rules and regulations of the Illinois Commerce Commission.

(c) Lessee shall not complete any well on the leased premises without notifying Lessor's Chief Engineer at St. Louis, by telegraph at least twenty-four (24) hours before such completion, and Lessee agrees to carry out such com-

pletion only during such period as may be specifically designated by Lessor after receiving said telegraphic notice. Lessee shall drill and complete all wells on the leased premises with every possible precaution and in the most approved manner, so as to avoid all risk of explosion, fire or other catastrophe, and so as not to interfere with the safe and convenient operations of Lessor. After completion, all producing wells shall, where practicable, be enclosed in sheet-iron houses, and the same shall be kept securely locked.

(d) Lessee agrees to keep the leased premises at all times clean and safe from waste oil and gas, and to store all oil [fol. 26] produced hereunder a sufficient distance from the leased premises to insure safe operation of trains thereover, and to take all possible precautions against hazard of fire, explosion or other catastrophe.

(e) Lessee agrees not to shoot, treat or rework any well on the leased premises without notifying Lessor's Chief Engineer at St. Louis, Mo., by telegraph at least twenty-four (24) hours in advance, and to carry out such operations only during such period as Lessor may specifically designate after receiving said telegraphic notice. Lessee further agrees to use every possible precaution and the most approved methods in carrying out such operations, so as to avoid all risk of fire, explosion or other catastrophe, and so as not to interfere with the safe and convenient operations of Lessor.

(f) Lessee agrees that it will not interfere with the telegraph, telephone and signal lines, or other structures, upon the leased premises, or with the operation of said facilities. In case Lessor's Superintendent, in writing, after written application of Lessee, approves the movement or rearrangement of any of said facilities, to permit of Lessee's operations under this lease, the work shall be done or caused to be done by Lessor at Lessee's cost, and Lessee on rendition of bills shall reimburse and pay to Lessor the cost of said work including the Lessor's then customary charges and surcharges for labor and material and, also, for use of equipment employed on the work and excise taxes on labor and materials, and cost for Workmen's Compensation and Public Liability Insurance carried by Lessor on said work.

(g) Lessee hereby agrees that it will not interfere with the use and occupancy of the leased premises by Lessor or

anyone thereon by Lessor's authority, nor with the property thereof, and will promptly pay any damages resulting from its failure so to do.

(h) Any storage tank, flow tank, oil sump or separator shall be built or installed by Lessee only at such places on the leased premises as shall be approved from time to time by Lessor's Chief Engineer, in writing.

9. Lessee hereby releases and discharges Lessor, Lessor's tenants and invitees, from all liability because of any [fol. 27] loss of or damage to Lessee's property, or of others in its possession, delay to Lessee's operations, and injury to or death of Lessee's employes, and Lessee will indemnify and save Lessor harmless from and against all actual expenses and claims because of loss of or damage to property, including that of Lessor, or of others in Lessor's possession or on Lessor's property, and because of injury to or death of persons, including Lessor's employes and passengers on Lessor's trains, and Lessor's tenants and invitees and their employes, growing out of, arising from, or in any way incident or attributable to the operations of Lessee, whether such loss, damage, injury or death be caused or contributed to by negligence or otherwise, and will promptly repay any sum or sums which Lessor, Lessor's tenants and invitees, may pay or be compelled to pay, and discharge any judgment or judgments that may be rendered against Lessor, Lessor's tenants and invitees, including all costs and attorney's fees, because of any such claim or claims. No other provision of this contract shall be construed to waive or limit the liability of Lessee as defined in this paragraph.

10. Lessee further agrees at Lessee's own expense to carry insurance at all times in a company or companies approved by Lessor, protecting Lessor, Lessor's tenants and invitees, and Lessee against the liability involved in the next preceding paragraph, with limits of $50,000.00 for one person and $100,000.00 for one accident for personal injuries, and $50,000.00 for property damage, and to furnish Lessor true original counterparts of such policies and have Lessor's written approval of said policies at least forty-eight (48) hours before entering the said leased premises hereunder.

11. Lessee further agrees to at all times, at Lessee's own cost and expense, defend, fully indemnify and forever save

harmless the Lessor, Lessor's successors and assigns, from all claims, damages, action or causes of action arising or in any manner growing out of the operations of Lessee in the production or removal of oil or gas in, on or from the premises herein conveyed, save and except therefrom, however, such oil or gas as may accrue to the credit or Lessor as royalties hereunder.

[fol. 28] 12. Lessee further agrees that Lessee will not create, suffer or permit the creation of any lien, either contractual, constitutional, statutory, or of any other sort whatsoever, on the premises hereby leased, or on any part thereof, or on any tools, casing, pipe or other equipment of any sort whatsoever used or about to be used on the leased premises.

13. It is agreed that the operating rights, duties and responsibilities of Lessee hereunder shall not be assignable by Lessee either in whole or in part, except after obtaining written consent to such assignment from Lessor. Lessee may, however, assign any portion of the proceeds from the working interest hereunder, provided that Lessee shall retain operation of the leased premises and shall remain liable to Lessor for all of the operating duties, responsibilities and liabilities of this contract. The appointment of a Receiver or a Trustee in Bankruptcy, affecting either the leased premises or Lessee, shall be construed to be a violation of the covenant against assignment.

14. In consideration of the premises, Lessee covenants and agrees during the entire term hereof:

(a) To deliver to the credit of Lessor, free of cost, in the pipe line to which each well on this lease is connected, or in tank cars in which such oil is loaded for transportation, the equal twenty nine-sixty fourths (29/64) part of all oil produced, saved and marketed from the leased premises, provided Lessee can produce and sell from all producing wells on the leased premises an average of more than thirty (30) barrels per well per day; and twenty two-sixty fourths (22/64) of all oil produced and saved from the leased premises, if Lessee produces and sells from all producing wells an average of thirty (30) barrels or less per well per day; it being understood and agreed by and between the parties hereto that in arriving at the average per well per day basis for any period during the term of this lease that it will be

based upon a pipe line month (said pipe line month not to exceed thirty-one [31] days), that is to say, each month Lessee is able to produce and sell an average of more than thirty (30) barrels of oil per well per day, Lessor shall receive said twenty nine-sixty fourths (26/64) of the oil produced and sold from said premises and that any month dur-
[fol. 29] ing the life of said lease the Lessee is not able to produce and sell from said wells an average of more than thirty (30) barrels of oil per well per day, then for each month Lessor shall receive twenty two-sixty fourths (22/64) of the oil produced and sold from said premises during such month;

(b) To pay Lessor for gas produced from any well, including that used for the manufacture of casinghead gasoline, the equal twenty nine-sixty fourths (29/64) part of the gross proceeds realized from the sale thereof so long as Lessee has been able to produce and sell from said premises said average of more than thirty (30) barrels of oil per day per well during the month and the equal twenty two-sixty fourths (22/64) part of the gross proceeds realized from the sale of said gas and cashinghead gasoline during such months that the Lessee has not been able to produce and sell an average of thirty (30) barrels of oil per well per day; it being further understood and agreed by and between the parties hereto that any sale of gas or casinghead gasoline will be pursuant to the terms and conditions of an agreement with the purchaser of such gas having mutual approval of the parties hereto; and

(c) To store and market, free of expense to Lessor, all royalty oil produced hereunder in the same manner as it stores and markets its own oil, whenever Lessor does not elect to take the same in kind, obtaining therefor the posted price prevailing in this field from day to day for oil of like kind and character, or at such other and different price or prices as shall have been approved, from time to time, by Lessor in writing; such payments to be made to Lessor at Lessor's Office in St. Louis, Missouri, on or before the fifteenth (15th) day of the month succeeding such production.

15. The due-date of all money royalties due Lessor hereunder is hereby fixed as the fifteenth (15th) day of each month covering oil production of the preceding month, and the twentieth (20th) day of each month covering gas pro-

duction of the preceding month; and it is expressly agreed that all such royalties not so paid within ten (10) days after the fifteenth (15th) day or twentieth (20th) day, as the case may be, shall bear interest at the rate of six per cent [fol. 30] (6%) per annum from such due-date until paid, but this provision shall in no manner waive or extend the specific due-dates of such royalty payments.

16. Lessee shall have the free use of oil and gas for all operations hereunder on the leased premises, and the royalties herein provided for shall be computed after proportionately deducting any so used.

17. As further consideration for this lease, Lessee expressly agrees to pay before delinquency, and save Lessor harmless from, sixty per cent (60%) of all increases in all taxes, and all intangible taxes, over and above those fixed for the year 1938, and also, sixty per cent (60%) of any and all taxes, other than income taxes during the life of this lease, whether called severance, gross production, pipe line or by any other name, caused or resulting from the development or production of oil or gas hereunder. Lessee agrees to bear and pay, and save Lessor harmless from, all taxes levied or assessed on Lessee's property contained, from time to time, on the leased premises.

18. As further consideration for this lease the Lessor and Lessee mutually covenant and agree that, subject to the provisions of Article III of this agreement, within sixty (60) days from the effective date of this lease, as hereinabove reserved, a readjustment and accounting shall be made between the Lessor and Lessee, to the end that the provisions of this Article II shall be applied retroactively from said effective date and due credit and adjustment shall be made of any payments made under Article I of this agreement.

19. It is agreed that Lessee shall furnish, install, operate and maintain, at Lessee's own expense, adequate apparatus for measuring all gas produced hereunder, said apparatus to be equipped with orifice meters or such other standard type of meter as may be mutually agreed upon; and all such equipment so installed on the leased premises, together with any buildings erected in connection therewith, shall be and remain Lessee's property, subject to the other provisions hereof. Whether such equipment is installed

on the leased premises or elsewhere, Lessor shall have free access thereto at all reasonable times. but the calibrating [fol. 31] and adjusting thereof and the changing of charts shall be done only by Lessee. All charts shall be available for examination by Lessor at any time.

20. All dry gas produced and sold hereunder shall be measured and computed on the basis of ten (10) ounces above an assumed atmospheric pressure of fourteen and four tenths (14.4) pounds per square inch absolute, and at a base temperature of sixty (60) degrees Fahrenheit; provided, that all coefficients used for such computations shall be subject to specific approval by Lessor.

21. Lessee shall test Lessee's metering equipment quarterly, and at the request of either party upon ten (10) days' notice to the other party. Lessee shall notify Lessor in writing ten (10) days in advance of Lessee's regular quarterly tests, so that Lessor may have a representative present to witness said test and any adjustments of the said metering equipment.

22. If upon any test any metering equipment is found to be out of operation or inaccurate by two per cent (2%) or more, registrations thereof shall be corrected to accuracy for any period which is known and agreed upon; but in case such period is not known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration, but not exceeding forty-five (45) days.

23. The gasoline content of all gas produced hereunder and used for the manufacture of casinghead gasoline shall be determined by tests made in accordance with the specifications and procedure of the Natural Gasoline Association of America, and such tests shall be computed on the basis of four (4) ounces above an assumed atmospheric pressure of fourteen and four tenths (14.4) pounds per square inch absolute, and at a base temperature of sixty (60) degrees Fahrenheit; provided that all coefficients used for such computations shall be subject to specific approval by Lessor.

24. Tests for gasoline content, air content and specific gravity shall be made quarterly, and at the request of either party upon ten (10) days' notice to the other party. Lessee shall notify Lessor in writing ten (10) days in ad-

[fol. 32] vance of Lessee's regular quarterly tests, so that Lessor may have a representative present to witness said tests.

25. Lessee shall have the right at any time within three months after the expiration of this lease by completed performance to remove all property and fixtures placed by Lessee on the leased premises, including the right to draw and remove casing. When requested by Lessor, Lessee shall bury all pipe lines below ordinary plow depth.

26. Lessor shall be furnished with the logs of all wells drilled by Lessee hereunder. Actual production from each quarter section in which any part of the leased premises is located shall be kept and reported separately. Lessor's authorized representatives shall at all reasonable times during office hours have access to Lessee's records and books of account for the purpose of inspection and of making copies thereof or excerpts therefrom, relating to the production and sale of oil and gas under the provisions of this lease.

27. Should Lessee fail in any manner to perform any of Lessee's obligations herein provided for, except as to the drilling of a well or wells in accordance with paragraph 5 or paragraph 6 or paragraph 7 of this lease, then at the option of Lessor, after five (5) days written notice mailed to Lessee at Milam Building, San Antonio, Texas, and Lessee's failure to correct the matter complained about, Lessor may declare this contract of lease terminated in its entirety.

Should Lessee fail only to drill a well or wells as provided for in paragraph 5, paragraph 6 and paragraph 7 of this lease, then this grant shall automatically terminate, without any action whatsoever by Lessor, as to all of the said premises not so drilled.

It is expressly understood and agreed that partial or total cancellation or termination of this grant under this paragraph 27 shall not be in lieu of damage suffered by Lessor, but that all of Lessor's rights of damages against Lessee for any breach of this contract shall be preserved.

Article III

In the event that Principal's title to oil rights on the premises in question be upheld in part and rejected in part

[fol. 33] by final decree of the United States District Court for the Eastern Division, Eastern Judicial District of Missouri in proceedings more fully described in Article I hereof, and be affirmed on appeal, if appeal be taken thereupon, if either party to this contract is of the opinion that a fair and equitable disposition of the rights of the contracting parties with respect to the oil rights that have been sustained requires some modified application of the provisions of Article II, then the parties hereto shall attempt to agree upon such modified terms and conditions so as to meet such exigencies and equities of the situation, and failing to agree, shall present their differences to the administrative Judge in the aforesaid proceedings and shall abide by his determination as to what is fair and equitable, with due regard for the intents and purposes of the agreement of lease expressed in Article II of this agreement, and with due regard for changes therein made necessary by any defects in title. Any such agreement or ruling of the Court with respect thereto shall, in so far as possible, be retroactively applicable from the date of this agreement, and accounting shall be adjusted pursuant to such agreement or ruling of the Court.

In Witness Whereof, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, has executed this agreement pursuant to and in accordance with the provisions of Order No. —, made and entered on the — day of —, 1938, by the United States District Court, Eastern Division, Eastern Judicial District of Missouri, in the aforesaid Proceedings, and Blackstock Oil Company has caused its corporate name to be signed hereunto by its President and its corporate seal to be hereto affixed by its Secretary, by authority of its Board of Directors, the day and year first above written.

—— ——, Trustee, Missouri-Illinois Railroad Company, Debtor.

[fol. 34] Witnesses: —— ——.

Blackstock Oil Company, By —— ——, President.

By —— ——, Secretary. (Affix Seal.)

Attest: —— ——.

STATE OF MISSOURI,
City of St. Louis, ss:

On this — day of ——, 1938, before me, the undersigned Notary Public, duly commissioned, qualified and acting, within and for the said City and State, appeared in person the within named Guy A. Thompson, personally known to me to be the duly appointed, qualified and acting Trustee of Missouri-Illinois Railroad Company, Debtor, by appointment of the Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and personally known to me to be the same person whose name is subscribed to the foregoing instrument, and acknowledged that as such Trustee he signed and delivered the said instrument as his free and voluntary act, for the consideration, uses and purposes therein mentioned and set forth.

In Testimony Whereof, I have hereunto set my hand and official seal the day and year first above written.

My commission will expire —— —, 19—.

——, Notary Public.

STATE OF TEXAS,
County of Bexar, ss:

I, ——, a Notary Public in and for said County in the State aforesaid, do hereby certify that H. L. Blackstock and ——, personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing, appeared before me, this day, in person and declared themselves to be the President and —— Secretary, respectively, of Blackstock Oil Company, a corporation, and acknowledged that they signed, sealed [fol. 35] and delivered the said instrument, as such President and —— Secretary, as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

Given under my hand and notarial seal at ——, in said County, this — day of ——, 1938. My commission will expire —— —, 19—. ——, Notary Public.

[Blue print attached to original Contract not here printed.]

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

RECORD ENTRY SHOWING FILING OF AMENDMENT TO PETITION OF TRUSTEE AND SEPARATE ANSWERS OF MAGNOLIA PETROLEUM CO., AND OHIO OIL CO., & HEARING UPON SAID PETITION AND SEPARATE ANSWERS—November 9, 1938

Amendment of Trustee of Missouri-Illinois Rd. Co., debtor, to his petition for determination of title, and for advice and directions respecting certain proposed oil operations on right of way of said debtor near Salem, Ill., filed by leave.

Separate answers of Magnolia Petroleum Co., Kingwood Oil Co., and Ohio Oil Co., to Trustee's aforesaid petition filed by leave.

Said Trustee's application as contained in his aforesaid petition, for interlocutory order authorizing Trustee to forthwith execute proposed contract with Blackstock Oil Co., to carry out the terms and conditions of said contract, to sell, etc., any oil or gas removed from said right of way property under said contract, and said Trustee to keep separate accounts of same and after payment of expenses, etc., to hold remainder of proceeds from sale of such gas or oil from said premises, pending determination of title thereto, heard, argued and submitted on briefs, Trustee's brief being filed forthwith and respondents granted two [fol. 36] days within which to file reply briefs. Trustee's draft of proposed interlocutory order submitted.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO PETITION OF TRUSTEE FOR DETERMINATION OF TITLE, AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT OF WAY NEAR SALEM, ILLINOIS—Filed November 9, 1938

[Amendment No. 1167]

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 6935

Comes now Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, by counsel, and respectfully

requests authority to amend subdivision (o) of Article I of "Exhibit A" to Trustee's petition (Rec. pp. 8961-8962) to read as follows:

(o) For all operations, services, costs and expenses incurred or assumed by Contractor in or in connection with Contractor's performance of Contractor's undertakings as in this Article I expressed and set forth, during each calendar month of term hereof, Principal shall pay to Contractor and Contractor accept, on or before, the fifteenth (15th) day of the next succeeding calendar month, payments to be determined as follows, to-wit:

(1) Cost of Each Well Completed During Such Calendar Month.

a. Price per foot depth of well (including therein the following items; service of geologist, Schlumberger survey, steel housing for well, changes in railroad facilities, casing fittings consisting of master valve, floatshoe, Hinder liter head and surface rights on adjoining property) $3.25

[fol. 37] b. Well connections and flow lines in place, lump sum per well 350.00

c. Necessary grading of temporary roads and cleaning up around well site, lump sum per well 200.00

d. Trucking expense incident to drilling and completing the well, lump sum per well 200.00

e. Actual invoice cost of:
Surface pipe,
Casing pipe,
Cementing surface pipe and casing,
Rental of cable tools at $5.00 per hour based on actual hours in use,
Tubing,
Tanks and separator,
Public liability.

f. 5 per cent for accounting and supervision.

(2) Operating Cost of Producing Oil after Drilling is Completed.

a. $25.00 per month per well for first five wells, and $15.00 per month per well for additional producing wells to cover cost of accounting and bookkeeping at Contractor's main office and in the field.

b. Invoice cost of rods, working barrel, pump unit with engine, including necessary connections and fittings at such time as wells cease to flow, and all other materials and supplies for production and saving of oil.

c. All of the labor cost for production and saving of oil.

d. 5% of items b and c for supervision.

(3) Gathering and Marketing Cost.

a. Actual cost, plus 5 per cent for the installation, maintenance and operation of facilities required for gathering the oil from the well tanks and loading the oil in tank cars. Should oil be delivered to pipe line, no facilities will be required.

[fol. 38] b. Actual transportation expense from loading track to destination, subject to the provisions of sub-paragraph (k) of Paragraph 1 of this Article I.

c. Actual cost of sales organization necessary to dispose of the oil up to a maximum of $500.00 per month, with 5 per cent thereon for supervision.

d. All State or Federal taxes on production or marketing of oil.

(4) Interest at the rate of six per cent (6%) per annum on the amount of any payment due Contractor hereunder and not paid to Contractor within sixty (60) days after Contractor's submission of bill and necessary supporting invoices.

And Petitioner prays that that portion of Trustee's petition appearing on pages 8943 and 8944 of the printed record in these proceedings be amended to correspond with the foregoing.

Respectfully submitted, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Co., Debtor, by Thos. T. Railey, Attorney for Trustee.

The foregoing amendments approved this 9th day of November, 1938.

Geo. H. Moore, United States District Judge.

[File endorsement omitted.]

In United States District Court

Answer of Magnolia Petroleum Company to Petition for Determination of Title and for Advice and Directions Respecting Certain Proposed Oil Operations on Right of Way of Missouri Pacific Railroad Company, Near Salem, Illinois—Filed November 9, 1938

[Answer No. 1167-A]

Now comes Magnolia Petroleum Company, by Craig & Craig, its Attorneys, and as answer to the Petition of the Trustee in this cause, represents to the Court as follows:

[fol. 39] (1). This Defendant denies that in these proceedings, on June 30th, 1933, the Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the Laws of the State of Missouri, and doing business in the State of Illinois, became a subsidiary debtor in these proceedings, and denies that the said Guy A. Thompson, Trustee, is now the duly appointed, qualified and Acting Trustee of said subsidiary debtor.

(2). This Defendant, further answering, neither admits nor denies that by Orders heretofore entered in these proceedings, being Order No. 122, Record Page 789, and Order No. 407, Record Page 3157, said Trustee had been granted blanket authority to enter into gas and oil leases and to contract for the drilling of oil wells on the rights-of-way of the various debtor Companies, but this Defendant, further answering, states the facts to be that if such an Order was entered that the Court was without jurisdiction to enter any such order with reference to the rights-of-way in Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, for the reason that parties who were necessary and interested in the said proceedings, viz., the landowner, who held the fee simple title to the said premises covered by the right-of-way, and this Defendant were not made parties to these proceedings, nor served with summons prior to the time of entry of any such Order granting any such blanket authority, and that, therefore, any alleged blanket Order was null and void and of no force and effect for the reason that the said Missouri-Illinois Railroad Company only held an easement over said lands as to its right-of-way and did not own or have title to the minerals thereunder.

(3). This Defendant, further answering, denies that the Trustee has the right, or had the right, to solicit bids for lease of Oil Rights upon that part of the right-of-way of the Missouri-Illinois Railroad which ranges from sixty (60) to sixty-six (66) feet in width and extends diagonally Northeast to Southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, [fol. 40] Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

(4). This Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owner William B. Young covering the southwest quarter of the northeast quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right and fee simple ownership of the Oil, Gas and other Minerals under the right-of-way of the said Railroad Company where the said right-of-way crosses the southwest quarter of the northeast quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states that the said William B. Young has the fee simple ownership of the said Oil and Gas and other Minerals under the right-of-way of the said Railroad Company through the southwest quarter of the northeast quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois.

(5). This Defendant, further answering, denies that the Missouri-Illinois Railroad Company by conveyances and decrees of record had at the time it became subsidiary debtor in these proceedings as aforesaid, and that the Trustee has now succeeded to all of the title hereinafter described, originally vested in the Centralia & Chester Railroad Company, a predecessor railroad company heretofore owning and operating the line of Railroad in Marion County, Illinois, now owned and operated by Petitioner, as Trustee, and denies that the Petitioner Trustee and the Missouri-Illinois Railroad Company have acquired any interest in the said Oil and Gas and other Minerals under the said right-of-way of

the Railroad through adverse possession, but states that the said Railroad has no right to the Oil, Gas or other Minerals under its said right-of-way either by conveyance or by adverse possession.

(6). This Defendant, further answering, admits that the following conveyances of right-of-way appear of Record in [fol. 41] the Recorder's Office of Marion County, Illinois, but states that said conveyances do not convey the right to the oil, gas, or other minerals under the tracts of land described in the following conveyances, viz.:

Warranty Deed, dated January 28th, 1898, recorded November 5, 1900, at Page 533, in Volume 60 of Deed Records, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of Three Hundred Dollars ($300.00), to the The Centralia & Chester Railroad Company, the following described right-of-way in Marion County, Illinois:

A strip of ground for right-of-way for said Company sixty (60) feet wide over and across the North One-Half of the Northeast Quarter of Section Twenty (20), Town two (2) North, Range Two (2) East of the Third Principal Meridian, where said Railroad is now located;

Warranty Deed dated August 13th, 1896, recorded November 19th, 1897, at Page 261 in Volume 55 of Deed Records, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of One Hundred Fifty Dollars ($150.00) conveyed to the The Centralia & Chester Railroad Company, the following described right-of-way in Marion County, Illinois, to-wit:

A strip of land for right-of-way for said Railroad Company sixty (60) feet wide over and across the Southwest Quarter of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian,

but that the said Conveyance vested only an easement for railroad purposes over said tract of land, and that the title to the said minerals remains in the land-owners, William Young and Emma Young, his wife, and that the said Oil and Gas Lease of the Defendant, the Magnolia Petroleum Company, covers the whole of the Southwest Quarter of the

Northeast Quarter of said Section Twenty (20) and covers and includes the Oil, Gas and other Minerals under the strip of land hereinabove last described, and that the Railroad Company has no right, title, or interest to the said Oil and Gas and other Minerals thereunder; and

[fol. 42] Warranty Deed dated August 14th, 1896, recorded November 19, 1897, in Volume 55, at Page 260, of the Record of Deeds, Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of One Hundred Dollars ($100.00) conveyed to the The Centralia & Chester Railroad Company, the following described right-of-way in Marion County, Illinois, to-wit:

A strip of ground sixty-six (66) feet wide for right-of-way for said Railroad Company over and across the east one-half of the northwest quarter of the southwest quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian;

but that the said conveyance did not pass title to the Oil and Gas and other Minerals and that the Ohio Oil Company is the owner of an Oil and Gas Lease from the landowner owning the fee simple title and the Oil, Gas and other Minerals under the right-of-way of the said Railroad Company hereinabove last described, and that the said Railroad Company has no right to drill for Oil or Gas or to remove the same from under this said right-of-way; and

Warranty Deed dated January 3, 1898, recorded January 25, 1898, at Page 577 in Volume 56 of Deed Records of Marion County, Illinois, wherein Caroline Rusler, a widow, for the consideration of One Hundred Twenty Dollars and Forty Cents ($120.40) conveyed to the The Centralia & Chester Railroad Company a right-of-way over and across the following described real estate in Marion County, Illinois, to-wit:

A strip of ground for right-of-way for said Company sixty (60) feet wide over and across the southeast quarter of the northeast quarter and the west one-half of the northwest quarter of the southwest quarter, and the southeast quarter of the northwest quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, it being the strip of

land over and across said above described tracts of land where the said Railroad is now located,

and that the said Deed did not convey the Oil, Gas and Other Minerals under the said strip of land therein described, but [fol. 43] that the title thereto remained in the landowner, and that the Ohio Oil Company holds ~~an~~ Oil and Gas Lease covering the fee simple title in and to the premises described as: West One-half of the Northwest Quarter of the Southwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Twenty (20) which gives it the right, under the terms of its Lease, to prospect and develop the premises for Oil and Gas subject to a one-eighth (⅛th) royalty interest in the owner of the fee, and that at the time the said Caroline Rusler, a widow, made the aforesaid Deed, hereinabove last described, that the said Caroline Rusler was the owner of an undivided one-half (½) interest only in the fee in said premises, and that the said Caroline Rusler, by her Deed, could not convey the title even for an easement as to the other one-half (½) interest in the said real estate, as to which she did not hold title, and that the said Deed of the said Caroline Rusler did not purport to convey a fee simple interest in said premises, but only an easement therein for the construction of the said railroad right-of-way.

(7). This Defendant, further answering, states that although the said Railroad has been in possession of the said premises and has used the same for railroad right-of-way and has laid railroad tracks over the said premises, still that the said Railroad and the said Trustee have not been in the open, actual, visible and exclusive possession of the Oil, Gas and other Minerals under the said premises, and have never been in the actual, visible, exclusive and open possession of the said Oil, Gas, and other Minerals under the said premises;

And this Defendant, further answering, states that the said Trustee and the said Railroad have not by adverse possession acquired any title in or to the said Oil, Gas, or Other Minerals, in, or under the said premises; and

(8). This Defendant, further answering states that the said Trustee and the said Missouri-Illinois Railroad is not now lawfully vested with title to all of the Oil and Mineral

Rights under the land herein referred to, and denies that the Trustee and the said Railroad Company is now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to; and

[fol. 44] (9). This Defendant, further answering, denies that numerous oil wells have been drilled in close proximity to Trustee's right-of-way, and that unless prompt action be taken to remove the oil underlying the said right-of-way it will be drawn into the wells on adjoining lands and that the value thereof will forever be lost to the Stockholders and Creditors of the Missouri-Illinois Railroad Company; and this Defendant, further answering, states the fact to be that the Stockholders, Creditors of the said Missouri-Illinois Company, and the said Railroad Company and the Trustee thereof, have no right, title, or interest in the Oil or Gas underlying the right-of-way of the said Company; and

(10). This Defendant, further answering, denies that the Court of Bankruptcy by reason of its Trustee's possession of said property, has jurisdiction of said property under Section Seventy-Seven (77) of the Bankruptcy Act to determine all questions respecting title thereto, and denies that, pending the determination of said Title, said Court has jurisdiction to instruct and direct the Trustee to take such action as the Court may deem advisable to prevent waste of said Oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined; and denies that the said Court has authority to direct that the expenses thereof be paid out of the proceeds of the Oil so removed, and denies that there should be any drilling on the right-of-way prior to the adjudication of adverse claims respecting the title in this said proceeding; and

(11). This Defendant, further answering, denies that the Blackstock Oil Company, or any other Company, under Lease from the Trustee, has any right, power, or authority to drill upon the said right-of-way for Oil or Gas, and further states that the Bid of the said Blackstock Oil Company is not attached to the Petition in this cause, and that the Petition, therefore, does not show what it is proposed to do with reference to drilling on said right-of-way, and that it would be extremely unfair and unjust to permit the drilling of said premises for Oil and Gas pending determination of the title of the adverse claimants and to permit payment

of the expenses thereof out of the oil recovered, when the [fol. 45] effect of such an order would be to confiscate the property of this Defendant and the other Defendants without any compensation therefor and permit the Drilling Contractor to exploit the property of said Defendant, and the other Defendants, and to indulge in a large amount of drilling and expenses upon the said premises at the cost of this Defendant, and that there is no Law, Statute, or authority under the law authorizing such a procedure which would amount to a confiscation of the property of this Defendant without giving it an opportunity to be heard; and

(12). This Defendant; further answering, denies that the Court should enjoin this Defendant from asserting any title in and to the land or to the Mineral, Oil or Gas Deposits in and under said right-of-way or extracted therefrom, and denies that the Court should find and decree that all Oil, Gas, and Mineral Rights in and under aforesaid right-of-way in and across the aforesaid Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, is now vested in the Petitioner, as Trustee of the Missouri-Illinois Railroad Company; and this Defendant, further answering, denies that the Trustee should be authorized to forthwith execute a contract with the Blackstock Oil Company, substantially in the form of Exhibit "A" filed with said Petition, and as therein provided, to make advances and payments out of funds in petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to otherwise carry out the terms and conditions of said contract; and this Defendant, further answering, denies that the Trustee, pending determination of adverse claims of title, should be authorized to sell and convey and to transfer title to any Oil or Gas removed from the aforesaid premises free and clear of all liens or claims of others predicated upon alleged adverse ownership of any rights in the said premises; and

(13). This Defendant, further answering, denies that the Trustee should be directed to keep separate account of the expense of drilling each well, and to keep separate account of all Oil and Gas removed from each separate tract to which adverse claim is herein asserted, and denies that [fol. 46] Trustee, after paying the expenses provided for in Article I of the Contract herewith filed as Exhibit "A",

and such other expenses as may be reasonably necessary in removing, conserving and marketing the Oil or Gas from said premises, should be allowed to reimburse himself therefor out of the proceeds of the sale of said oil and/or gas; and this Defendant, further answering, denies that the Trustee should be directed to hold the remainder of said proceeds for the account of whom concerned, as may hereafter be determined by appropriate orders of this Court; and denies that the Trustee of the Railroad is entitled to the Oil or Gas, in, or under the said premises; and denies that the Trustee or the Railroad is entitled to drill for oil or gas on the said right-of-way, and states the fact to be that the Charter of the said Railroad Company recognizes and recites that the said Railroad Company had only the right to acquire a right-of-way or surface easement for Railroad Purposes over the said premises, and had no right to acquire the fee simple title to the Oil, Gas and Other Minerals thereunder; and

(14). This Defendant, further answering, denies that the Petition is positively verified; and that the Trustee merely verifies said Petition on information and belief, and merely alleges on information and belief that the Trustee has title to the Oil, Gas, and other Minerals under the said premises, and that, under such an allegation and verification that this Court has no right, power or authority to issue a temporary restraining order as against this Defendant, and has no right, power, or authority to authorize the Trustee to proceed to drill for Oil and Gas under the said premises; and

(15). This Defendant, further answering, states that the said Petition shows upon its face that any rights that the said Trustee and said Railroad Company may have in the railroad right-of-way described in said Petition, is merely a surface easement, and that the said Petitioner and the said Railroad Company have no right, title or interest in, or to the Oil or Gas or other Minerals under the said Rail- [fol. 47] road right-of-way, and have no right to drill for Oil or Gas upon the said Railroad right-of-way.

Magnolia Petroleum Company, Defendant, by Craig and Craig, by Craig Van Meter, Attorneys for Said Defendant. Craig & Craig, Attorneys for Defendant, 1803-1805-1807 Broadway Avenue, Mattoon, Illinois.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER OF OHIO OIL COMPANY TO PETITION FOR DETERMINATION OF TITLE AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT OF WAY OF MISSOURI PACIFIC RAILROAD COMPANY, NEAR SALEM, ILLINOIS—Filed November 9, 1938

[Answer No. 1167-C]

Now comes Ohio Oil Company by Craig & Craig, its Attorneys, and as answer to the Petition of the Trustee in this cause, represents to the Court as follows:

(1). This Defendant denies that in these proceedings, on June 30th, 1933, the Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the Laws of the State of Missouri, and doing business in the State of Illinois, became a subsidiary debtor in these proceedings, and denies that the said Guy A. Thompson, Trustee, is now the duly appointed, qualified and acting Trustee of said subsidiary debtor;

(2). This Defendant, further answering, neither admits nor denies that by Orders heretofore entered in these proceedings, being Order No. 122, Record Page 789, and Order No. 407, Record Page 3157, said Trustee had been granted blanket authority to enter into Gas and Oil Leases and to contract for the drilling of oil wells on the rights of way of the various debtor Companies, but this Defendant, further answering, states the facts to be, that if such an Order [fol. 48] was entered that the Court was without jurisdiction to enter any such Order with reference to the rights of way in Section Twenty (20), Township (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, for the reason that parties who were necessary and interested in the said proceedings, viz., the landowner, who held the fee simple title to the said premises covered by the right of way, and this Defendant were not made parties to these proceedings, nor served with summons prior to the time of entry of any such Order granting any such blanket authority, and that, therefore, any alleged blanket Order was null and void and of no force and effect for the reason that the said Missouri-Illinois Railroad Company only held an easement over said lands as to its

right of way and did not own or have title to the minerals thereunder.

(3). This Defendant, further answering, denies that the Trustee has the right, or had the right, to solicit bids for lease of Oil Rights upon that part of the right of way of the Missouri-Illinois Railroad which ranges from sixty (60) to sixty-six (66) feet in width and extends diagonally Northeast to Southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

(4). This Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owners, Martha J. Young, a widow, Mabel C. Young, spinster, Benjamin F. Young, Rueben Young and Jesse R. Young, covering the southeast quarter of the northwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right and fee simple ownership of the Oil, Gas and other Minerals under the right-of-way of the said Railroad Company where the said right of way crosses the southeast quarter of the northwest quarter of section twenty (20), township two (2) north, range two (2) [fol. 49] East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states that the said Martha J. Young, a widow, Mabel C. Young, spinster, Benjamin F. Young, Rueben Young have the fee simple ownership of the said Oil and Gas and other Minerals under the right of way of the said Railroad Company through the southeast quarter of the northwest quarter of Section twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois; and this Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owners, Lula Young, a widow, and Roger C. Young, covering the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County,

Illinois, and that its rights under said Oil and Gas Lease give it the right and fee simple ownership of the Oil, Gas and other Minerals under the right of way of the said Railroad Company where the said right of way crosses the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states that the said Lula Young, a widow, and Roger C. Young have the fee simple ownership of the said Oil and Gas and other Minerals under the right of way of the said Railroad Company through the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois.

(5). This Defendant, further answering, denies that the Missouri-Illinois Railroad Company by conveyances and decrees of record had at the time it became subsidiary debtor in these proceedings as aforesaid, and that the Trustee has now succeeded to all of the title hereinafter described, originally vested in the Centralia & Chester Railroad Company, a predecessor railroad company heretofore owning and operating the line of Railroad in Marion County, Illinois, now owned and operated by Petitioner, as Trustee, and denies that the Petitioner Trustee and the Missouri-Illinois [fol. 50] Railroad Company have acquired any interest in the said Oil and Gas and other Minerals under the said right of way of the Railroad through adverse possession, but states that the said Railroad has no right to the Oil, Gas or other Minerals, under its said right of way either by conveyance or by adverse possession.

(6). This Defendant, further answering, admits that the following conveyances of right of way appear of Record in the Recorder's Office of Marion County, Illinois, but states that said conveyances do not convey the right to the Oil, Gas or other Minerals under the tracts of land described in the following conveyances, viz.:

Warranty Deed dated January 28th, 1898, recorded November 5, 1900, at Page 533, in Volume 60 of Deed Records, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of Three Hundred Dollars ($300.00), to the The Centralia & Chester Railroad

Company, the following described right of way in Marion County, Illinois:

"A strip of ground for right of way for said Company sixty (60) feet wide over and across the North One-Half of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, where said Railroad is now located;"

Warranty Deed dated August 13th, 1896, recorded November 19th, 1897, at Page 261, in Volume 55 of Deed Records, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of One Hundred Fifty Dollars ($150.00) conveyed to The Centralia & Chester Railroad Company the following described right of way in Marion County, Illinois:

"A strip of land for right of way for said Railroad Company sixty (60) feet wide over and across the Southwest Quarter of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian,"

but that the said conveyance vested only an easement for railroad purposes over said tract of land, and that the title to the said minerals remains in the landowners, William Young and Emma Young, his wife, and that the Magnolia [fol. 51] Petroleum Company is the owner of an Oil and Gas Lease which covers the whole of the southwest quarter of the northeast quarter of said Section Twenty (20) which covers and includes the Oil, Gas and other Minerals under the strip of land hereinabove last described, and that the Railroad Company has no right, title, or interest to the said Oil and Gas and other Minerals thereunder; and

Warranty Deed dated August 14th, 1896, recorded November 19, 1897, in Volume 55, at Page 260, of the Record of Deeds, Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of One Hundred Dollars ($100.00) conveyed to the The Centralia & Chester Railroad Company, the following described right of way in Marion County, Illinois, to-wit:

"A strip of ground sixty-six (66) feet wide for right of way for said Railroad Company over and across the east one-half of the northwest quarter of the southwest quarter

of Section twenty (20), Town two (2) North, Range Two (2) East of the Third Principal Meridian;"

but that the said conveyance did not pass title to the Oil and Gas and other Minerals and that this Defendant, the Ohio Oil Company, is the owner of an Oil and Gas Lease from the landowner owning the fee simple title and the Oil, Gas and other Minerals under the right of way of the said Railroad Company hereinabove last described, and that the said Railroad Company has no right to drill for Oil or Gas or to remove the same from under this said right of way; and

Warranty Deed dated January 3, 1898, recorded January 25, 1898, at Page 577, in Volume 56 of Deed Records of Marion County, Illinois, wherein Caroline Rusler, a widow, for the consideration of One Hundred Twenty Dollars and Forty Cents ($120.40) conveyed to the The Centralia & Chester Railroad Company a right of way over and across the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground for right of way for said Company sixty (60) feet wide over and across the southeast quarter of the northeast quarter and the west one-half of the northwest quarter of the southwest quarter, and the southeast [fol. 52] quarter of the northwest quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located," and that the said Deed did not convey the Oil, Gas and other Minerals under the said strip of land therein described, but that the title thereto remained in the land owner, and that this Defendant, the Ohio Oil Company holds an Oil and Gas Lease covering the fee simple title in and to the premises described as: West One-Half of the Northwest Quarter of the Southwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Twenty (20) which gives it the right, under the terms of its Lease, to prospect and develop the premises for Oil and Gas subject to a one-eighth (⅛th) royalty interest in the owner of the fee, and that at the time the said Caroline Rusler, a widow, made the aforesaid Deed, hereinabove last described, to said railroad company, that the said Caroline Rusler was the owner of an undivided one-half (½) interest only in the fee in said premises, and that

the said Caroline Rusler, by her Deed could not convey the title even for an easement as to the other one-half (½) interest in the said real estate, as to which she did not hold title, and that the said Deed of the said Caroline Rusler did not purport to convey a fee simple interest in said premises, but only an easement therein for the construction of the said railroad right of way.

(7). This Defendant, further answering, states that although the said Railroad has been in possession of the said premises and has used the same for railroad right of way and has laid railroad tracks over the said premises, still that the said Railroad and the said Trustee have not been in the open, actual, visible and exclusive possession of the Oil, Gas and other Minerals under the said premises, and have never been in the actual, visible, exclusive and open possession of the said Oil, Gas and other Minerals under the said premises:

And this Defendant, further answering, states that the said Trustee and the said Railroad have not by adverse possession acquired any title in or to the said Oil, Gas or other Minerals, in, or under the said premises; and

[fol. 53] (8). This Defendant, further answering, states that the said Trustee, and the said Missouri-Illinois Railroad, is not now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to, and denies that the Trustee and the said Railroad Company is now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to; and

(9). This Defendant, further answering, denies that numerous oil wells have been drilled in close proximity to Trustee's right of way, and that, unless prompt action be taken to remove the oil underlying the said right of way it will be drawn into the wells on adjoining lands and that the value thereof will be forever lost to the Stockholders and Creditors of the Missouri-Illinois Railroad Company; and this Defendant, further answering, states the facts to be that the Stockholders, Creditors, of the said Missouri-Illinois Company, and the said Railroad Company and the Trustee thereof, have no right, title, or interest in the Oil or Gas underlying the right of way of the said Company; and

(10). This Defendant, further answering, denies that the Court of Bankruptcy by reason of its Trustee's possession of said property, has jurisdiction of said property under Section Seventy-Seven (77) of the Bankruptcy Act, to determine all questions respecting title thereto, and denies that pending the determination of said Title, said Court has jurisdiction to instruct and direct the Trustee to take such action as the Court may deem advisable to prevent waste of said Oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined; and denies that the said Court has authority to direct that the expenses thereof be paid out of the proceeds of the Oil so removed, and denies that there should be any drilling on the right of way prior to the adjudication of adverse claims respecting the title in this said proceeding; and

(11). This Defendant, further answering, denies that the Blackstock Oil Company, or any other Company, under Lease from said Trustee, has any right, title, power, or authority to drill upon the said right of way for Oil or Gas, and further states that the Bid of the said Blackstock Oil Com- [fol. 54] pany is not attached to the Petition in this cause, and that the Petition, therefore, does not show what it is proposed to do with reference to drilling on said right of way, and that it would be extremely unfair and unjust to permit the drilling of said premises for Oil and Gas pending determination of the title of the adverse claimants and to permit payment of the expenses thereof out of the proceeds from oil recovered, when the effect of such an Order would be to confiscate the property of this Defendant and the other Defendants without any compensation therefor and permit the Drilling Contractor to exploit the property of said Defendant, and the other Defendants, and to indulge in a large amount of drilling and expenses upon the said premises when there is no Law, Statute, or authority under the Law, authorizing such a procedure, which would amount to a wrongful confiscation of the oil and property of this Defendant; and

(12). This Defendant, further answering, denies that the Court should enjoin this Defendant from asserting any title in and to the land or to the Mineral, Oil or Gas Deposits in and under said right of way or extracted therefrom, and denies that the Court should find and decree that all Oil, Gas

and Mineral Rights in and under aforesaid right of way in and across the aforesaid Section Twenty (20), Town Two (2) Nor. , Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, is now vested in the Petitioner, as Trustee of the Missouri-Illinois Railroad Company; and this Defendant, further answering, denies that the Trustee should be authorized to forthwith execute a contract with the Blackstock Oil Company, substantially in the form as Exhibit "A" filed with said Petition, and as therein provided, to make advances and payments out of funds in Petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to otherwise carry out the terms and conditions of said Contract; and this Defendant, further answering, denies that the Trustee, pending determination of adverse claims of title should be authorized to sell and convey and to transfer title to any Oil or Gas removed from the aforesaid premises, free and clear of all liens or claims of others; predicated upon alleged adverse ownership of any rights in the said premises; and says [fol. 55] that such an Order, if made, would be void; and this Defendant, further answering, denies the right of the Trustee and the authority of the Court to dissipate the assets of the Railroad Company by contracting for the expenditure of large sums of money in a line of business foreign to that for which it was incorporated, and for which it might never be reimbursed, to exploit right of way lands for the production of Oil and Gas to which it has no title, thereby causing great damage to the rightful owners of such Oil and Gas, for which it would be held to account.

(13.) This Defendant, further answering, denies that the Trustee should be directed to keep separate account of the expense of drilling each well, and to keep separate account of all Oil and Gas removed from each separate tract to which adverse claim is herein asserted, and denies that Trustee, after paying the expenses provided for in Article I of the Contract herewith filed as Exhibit "A", and such other expenses as may be reasonably necessary in removing, conserving and marketing the Oil or Gas from said premises, should be allowed to reimburse himself therefor out of the proceeds of the sale of said Oil and/or Gas; and this Defendant, further answering, denies that the Trustee should be directed to hold the remainder of said proceeds

for the account of whom concerned, hereafter to be determined by appropriate orders of this Court; and denies that the Trustee of the Railroad is entitled to the Oil or Gas, in, or under the said premises; and denies that the Trustee or the Railroad is entitled to drill for Oil or Gas on the said right of way, and states the fact to be that the Charter of the said Railroad Company recognizes and recites that the said Railroad Company had only the right to acquire a right of way or surface easement for Railroad Purposes over the said premises, and had no right to acquire the fee simple title to the Oil, Gas and Other Minerals thereunder; and

(14). This Defendant, further answering, denies that the Petition is positively verified; and that the Trustee merely verifies said Petition on information and belief, and merely alleges on information and belief that the Trustee has title to the Oil, Gas and other Minerals under the said premises, and that, under such an allegation and verification, this [fol. 56] Court has no right, power, or authority to issue a temporary restraining order as against this Defendant, and has no right, power, or authority to authorize the Trustee to proceed to drill for Oil and Gas under the said premises; and

(15). This Defendant, further answering, states that the said Petition shows upon its face that any rights that the said Trustee and said Railroad Company may have in the railroad right of way described in said Petition, is merely a surface easement and that the said Petitioner and the said Railroad Company have no right, title, or interest in, or to the Oil or Gas, or Other Minerals under the said Railroad right of way, and have no right to drill for oil or gas upon the said Railroad right of way.

Ohio Oil Company, Defendant, by Craig & Craig, Craig Van Meter, Attorneys for Said Defendant. Craig & Craig, Attorneys for Defendant, 1803-1805-1807 Broadway Avenue, Mattoon, Illinois.

[File endorsement omitted.]

In United States District Court

Order, November 14, 1938, Authorizing Guy A. Thompson, Trustee, to Enter into Contract for Drilling of Wells and Marketing of Oil and Gas, etc.; Decree—Filed Nov. 14, 1938

[Interlocutory Order No. 1167]

In the Matter of Missouri Pacific Railroad Company, Debtor

In Proceedings for the Reorganization of a Railroad

No. 6935

This matter coming on for further hearing this 9th day of November, 1938, on petition of Guy A. Thompson, Trus- [fol. 57] tee, Missouri-Illinois Railroad Co., Debtor, for an order approving contract between Trustee and Blackstock Oil Company, substantially in form of "Exhibit A" filed with Trustee's petition; for an order determining and protecting Trustee's title to the minerals, including oil and gas, underlying or removed from the land on which right of way of Missouri-Illinois Railroad is situated, ranging from 30 to 33 feet on each side of the center line of the main-line track and extending diagonally northeast to southwest across the Northeast Quarter, and the Southeast Quarter of the Northwest Quarter, and the Northwest Quarter of the Southwest Quarter, all in Section 20, Township 2 North, Range 2 East of the third principal meridian in Salem Township, Marion County, Illinois; for an order authorizing Blackstock Oil Company, after execution of said contract and pursuant to Article I thereof, to immediately proceed with the drilling of wells and the removal and marketing of the oil and gas from said lands, the proceeds thereof, after deducting expenses for drilling, conservation, and marketing, to be held by Trustee for the account of those concerned as their rights, title, and interest may in these proceedings be hereafter determined by this Court; and for an order vesting Trustee with title and enjoining interference therewith:

And it appearing to the Court that The Ohio Oil Company, with offices at Findlay, Ohio, Kingwood Oil Company, with offices at Mattoon, Illinois, and Magnolia Oil Company,

with offices in Magnolia Building, Dallas, Texas, are the only adverse claimants who have affirmatively asserted claim to title to any or all of the aforesaid property or to the oil or gas removed therefrom, and it appearing to the satisfaction of the Court that each of said oil companies has been given ample notice of this hearing and has been sent by registered mail copy of Trustee's petition pursuant to which this order is entered, with notice to appear and be heard at the time of the presentation thereof:

And said The Ohio Oil Company, Kingwood Oil Company, and Magnolia Oil Company having each entered their appearance by counsel and participated in these proceedings; and the Court having heard such evidence as the [fol. 58] parties care to offer respecting the necessity for an interlocutory order permitting the drilling upon said property and the removal, conservation, and marketing of oil and gas therefrom pending determination of any adverse claim to title; and the Court being otherwise fully advised in the premises, finds:

(a) That said Guy A. Thompson, as Trustee, Missouri-Illinois Railroad Co., Debtor, acting under the jurisdiction of this Court, is in actual possession of the property hereinbefore described, under assertion of claim to fee-simple title thereto, and that this Court has accordingly jurisdiction over the subject matter and is vested with authority to determine the interest of adverse claimants in and to the mineral, oil and gas rights in and underlying said property and to protect the interest of the Trustee therein;

(b) That immediate action is necessary to conserve the oil supply underlying said property for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court:

(c) That this Court has authority to direct that the expenses thereof be borne, in so far as possible, out of the proceeds of the oil so received;

(d) That in addition to The Ohio Oil Company, Kingwood Oil Company, and Magnolia Oil Company, each of which has, through appearance of counsel and participation in these proceedings, entered their respective appearances, there may be other claimants unknown who should be brought into these proceedings by publication:

Now, It Is Accordingly Ordered:

(1) That said The Ohio Oil Company, Kingwood Oil Company, and Magnolia Oil Company plead to Trustee's petition within twenty days from this date, setting forth such claims to adverse title to the mineral, oil and gas rights in or under the property in question as they may care to assert.

(2) That notice in substantially the following form and preceded by the caption of these proceedings be printed by the clerk of this Court in at least two consecutive issues of [fol. 59] a newspaper of general circulation in the County of Marion, Illinois, to-wit:

"Whereas, Missouri-Illinois Railroad Company has heretofore filed petition as subsidiary of Missouri Pacific Railroad Company for reorganization, pursuant to the provisions of Section 77 of the Bankruptcy Act, which proceedings more fully described in caption are pending in the United States District Court for the Eastern Division, Eastern Judicial District of Missouri; and

"Whereas, this Court, through its Trustee, now has possession and jurisdiction over certain lands on which right of way of the Missouri-Illinois Railroad Company is situated, extending diagonally northeast to southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section 20, Township 2 North, Range 2 East, in Salem Township, Marion County, Illinois; and

"Whereas, Trustee has filed in said proceedings petition seeking an adjudication of Trustee's title to the right of way in the aforesaid section and to the mineral, oil and gas rights underlying said right of way:

"Now, It Is Accordingly Hereby Ordered:

"That any adverse claimant asserting title to any part of the land upon which said right of way is situated or to the mineral, oil or gas rights underlying said right of way, file within 20 days from the date of this order with the clerk of this Court answer or other return to the said petition of Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, showing cause, if any there be, why this Court should not find and decree that all oil, gas and mineral rights in and under the aforesaid right of way, in and across said Section 20, are now vested in petitioner as

Trustee, Missouri-Illinois Railroad Company, Debtor; and pending further order of this Court to the contrary, all such claimants are hereby enjoined from otherwise asserting any further title in and to the land over and upon which said right of way is located, or to the mineral, oil or gas deposits in and under said right of way or extracted therefrom.

[fol. 60] "For further details see decree on file with the clerk of this Court.

"Dated November 14, 1938.

"George H. Moore, United States District Judge."

(3) That Trustee be and he hereby is authorized to enter into contract with Blackstock Oil Company substantially in the form of Exhibit A filed with Trustee's petition, as amended on motion of Attorney for Trustee, and pursuant to the terms of Article I thereof to arrange for the immediate drilling of wells and the removal, conservation, and marketing of the oil and gas taken from said premises, provided not more than five wells may be drilled on said right of way pending determination of title without further approval of this Court.

(4) That the proceeds from the sale of such oil and gas shall be paid over to Trustee, and Trustee, after deducting therefrom the expenses under Article I of said contract and other reasonably necessary expenses in drilling, removing, conserving, and marketing said oil and gas, shall hold the remainder of said proceeds for the account of adverse claimants and parties in interest as their respective rights may hereafter be determined by order of this Court in these proceedings.

(5) That Trustee, until the Court may otherwise order and direct, be and he hereby is vested with title to said oil and gas underlying or removed from said premises, and with the right to convey said title free and clear of all claims predicated upon alleged adverse ownership of any part of the land upon which Trustee's right of way is situated or the mineral, oil or gas rights therein, and any one purchasing said oil or gas from or through Trustee shall acquire good and merchantable title thereto.

(6) That, pending further order of this Court to the contrary, all parties, regardless of whether their appearance

shall have been entered in these proceedings, are enjoined and restrained from interfering with the drilling upon said premises by Blackstock Oil Company pursuant to aforesaid [fol. 61] contract with Trustee, or from asserting or attempting to enforce, other than in these proceedings, any adverse claim to said premises or to the mineral, oil or gas in or underlying said premises or extracted therefrom, or from attacking or interfering with the title thereto of any purchaser holding under or through Trustee.

(7) That Trustee be and he hereby is directed to keep separate account of the expense incurred in drilling each well and to keep separate account of all oil and gas removed from each separate tract to which adverse claim is asserted in these proceedings, and of the expenses and profits in connection therewith. Pending further order of this Court, all of the funds coming into possession of Trustee from the sale of the oil in question less such expenses as are herein authorized to be borne out of said funds, shall be held in separate bank account as a trust fund and shall not be commingled with the other assets of the Trustee of Missouri-Illinois Railroad Company, and in the event and to the extent that Trustee's title to said funds may be upheld, this Court reserves jurisdiction to thereupon determine the alleged rights of the Trustee under the First Mortgage of the Missouri-Illinois Railroad Company to receive and take possession of said funds as security under said mortgage, and nothing herein contained shall prejudice any claim of said mortgage trustees to a lien upon said funds or to a lien upon the rights of Missouri-Illinois Railroad Company or of the Trustee of said Railroad Company under the aforesaid contract.

(8) That this Court reserves jurisdiction to amend or amplify this interlocutory order as may hereafter be deemed proper, but without prejudice to the title of any one who theretofore has purchased or acquired oil or gas from or through Trustee, in reliance upon this interlocutory order; and the Court further reserves jurisdiction to hear on their merits any adverse claims to title, and reserves the right to direct the cessation of any drilling by Trustee or Contractor if it be determined that Trustee has no title to the mineral, oil and gas rights underlying the portion of the

right of way in question, and to enter such further or dif-
[fol. 62] ferent order as to the Court may seem proper.

Geo. H. Moore, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER OF MAGNOLIA PETROLEUM COMPANY TO PETITION FOR DETERMINATION OF TITLE AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT OF WAY OF MISSOURI PACIFIC RAILROAD COMPANY NEAR SALEM, ILLINOIS—Filed November 28, 1938

[Answer No. 1167-D]

Now comes Magnolia Petroleum Company, by Cobbs, Logan, Roos & Armstrong, and Craig & Craig, its Attorneys, and as answer to the Petition of the Trustee in this cause, represents to the Court as follows:

(1)

This Defendant denies that in these proceedings, on June 30th, 1933, the Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the Laws of the State of Missouri, and doing business in the State of Illinois, became a subsidiary debtor in these proceedings, and denies that the said Guy A. Thompson, Trustee, is now the duly appointed, qualified and acting Trustee of said subsidiary debtor.

(2)

This Defendant, further answering, neither admits nor denies that by Orders heretofore entered in these proceedings, being Order No. 122, Record Page 789, and Order No. 407, Record Page 3157, said Trustee had been granted blanket authority to enter into gas and oil leases and to contract for the drilling of oil wells on the rights of way of the various debtor Companies, but this Defendant, further answering, states the facts to be that if such an Order was entered that the Court was without jurisdiction

to enter any such order with reference to the rights of way in Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion [fol. 63] County, Illinois, for the reason that parties who were necessary and interested in the said proceedings, viz., the landowner, who held the fee simple title to the said premises covered by the right of way, owners of part interests in the oil and gas under said right of way, and this Defendant were not made parties to these proceedings, nor served with summons prior to the time of entry of any such Order granting any such blanket authority, and that, therefore, any alleged blanket Order was null and void and of no force and effect for the reason that the said Missouri-Illinois Railroad Company only held an easement over said lands as to its right of way and did not own or have title to the minerals thereunder.

(3)

This Defendant, further answering, denies that the Trustee has the right, or had the right to solicit bids for lease of All Rights upon that part of the right of way of the Missouri-Illinois Railroad which ranges from sixty (60) to sixty-six (66) feet in width and extends diagonally Northeast to Southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

(4)

This Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owner, William B. Young, covering the southwest quarter of the northeast quarter of Section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right to and fee simple ownership of the Oil, Gas and other Minerals under the right of way of the said Railroad Company where the said right of way crosses the southwest quarter of the northeast quarter of section twenty (20), township two (2)

north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states [fol. 64] that the said William B. Young has the fee simple ownership of the said Oil and Gas and other Minerals under the right of way of the said Railroad Company through the southwest quarter of the northeast quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and that the said William B. Young has not been properly served with summons in this proceedings and is not before this Court.

(5)

This Defendant, further answering, denies that the Missouri-Illinois Railroad Company by conveyances and decrees of record had at the time it became subsidiary debtor in these proceedings as aforesaid, and that the Trustee has now succeeded to all of the title hereinafter described, originally vested in The Centralia & Chester Railroad Company, a predecessor railroad company heretofore owning and operating the line of Railroad in Marion County, Illinois, now owned and operated by Petitioner, as Trustee, and denies that the Petitioner Trustee and the Missouri-Illinois Railroad Company have acquired any interest in the said Oil and Gas and other Minerals under the said right of way of the Railroad through adverse possession, but states that the said Railroad has no right to the Oil, Gas or other Minerals under its said right of way either by conveyance or by adverse possession.

(6)

This Defendant, further answering, admits that the following conveyances of right of way appear of Record in the Recorder's Office of Marion County, Illinois, but states that said conveyances do not convey the right to the oil, gas, or other minerals under the tracts of land described in the following conveyances, viz.:

Warranty Deed, dated January 28th, 1898, recorded November 5, 1900, at Page 533, in Volume 60 of Deed Records, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of Three Hundred Dollars ($300.00), to the The Centralia & Chester

Railroad Company, the following described right of way in Marion County, Illinois:

[fol. 65] A strip of ground for right of way for said Company sixty (60) feet wide over and across the North One-Half of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, where said Railroad is now located:

Warranty Deed dated August 13th, 1896, recorded November 19th, 1897, at Page 261, in Volume 55 of Deed Records, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of One Hundred Fifty Dollars ($15)0) conveyed to the The Centralia & Chester Railroad Company the following described right of way in Marion County, Illinois, to-wit:

A strip of land for right of way for said Railroad Company sixty (60) feet wide over and across the Southwest Quarter of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian,

but that the said conveyance vested only an easement for railroad purposes over said tract of land, and that the title to the said minerals remains in the landowners, William Young and Emma Young, his wife, and that the said Oil and Gas Lease of the Defendant, the Magnolia Petroleum Company, covers the whole of the Southwest Quarter of the Northeast Quarter of said Section Twenty (20) and covers and includes the Oil, Gas and Other Minerals under the strip of land hereinabove last described, and that the Railroad Company has no right, title, or interest, to the said Oil and Gas and Other Minerals thereunder; and

Warranty Deed dated August 14th, 1896, recorded November 19, 1897, in Volume 55, at Page 260, of the Record of Deeds of Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of One Hundred Dollars ($100.00) conveyed to the The Centralia & Chester Railroad Company the following described right of way in Marion County, Illinois, to-wit:

A strip of ground sixty-six (66) feet wide for right of way for said Railroad Company over and across the east [fol. 66] one-half of the northwest quarter of the southwest

quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian;

but that the said conveyances did not pass title to the Oil and Gas and Other Minerals and that the Ohio Oil Company is the owner of an Oil and Gas Lease from the landowner owning the fee simple title and the Oil, Gas and Other Minerals under the said right of way of the said Railroad Company hereinabove last described, and that the said Railroad Company has no right to drill for Oil or Gas or to remove the same from under this said right of way; and

Warranty Deed dated January 3, 1898, recorded January 25, 1898, at Page 577 in Volume 56 of Deed Records of Marion County, Illinois, wherein Caroline Rusler, a widow, for the consideration of One Hundred Twenty Dollars and Forty Cents ($120.40) conveyed to the The Centralia & Chester Railroad Company a right of way over and across the following described real estate in Marion County, Illinois, to-wit:

A strip of ground for right of way for said Company sixty (60) feet wide over and across the southeast quarter of the northeast quarter and the west one-half of the northwest quarter of the southwest quarter and the southeast quarter of the northwest quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located,

and that the said Deed did not convey the Oil, Gas and Other Minerals under the said strip of land therein described, but that the title thereto remained in the landowner, and that the Ohio Oil Company holds an Oil and Gas Lease covering the fee simple title in and to the premises described as: West One-half of the Northwest Quarter of the Southwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Twenty (20) which gives it the right, under the terms of its Leases, to prospect and develop the premises for Oil and Gas subject to a one-eighth (⅛th) royalty interest in the owner of the fee, and that at the time the said [fol. 67] Caroline Rusler, a widow, made the aforesaid Deed, hereinabove last described to said Railroad Company that the said Caroline Rusler was the owner of an undivided

one-half (½) interest only in the fee in said premises, and that the said Caroline Rusler, by her Deed, could not convey the title even for an easement as to the other one-half (½) interest in the said real estate; as to which she did not hold title, and that the said Deed of the said Caroline Rusler did not purport to convey a fee simple interest in said premises, but only an easement therein for the construction of the said railroad right of way.

(7)

This Defendant, further answering, states that although the said Railroad has been in possession of the said premises and has used the same for railroad right of way and has laid railroad tracks over the said premises, still that the said Railroad and the said Trustee have not been in the open, actual; visible and exclusive possession of the Oil, Gas and Other Minerals under the said premises, and have never been in the actual, visible, exclusive and open possession of the said Oil, Gas, and other Minerals under the same premises;

And this Defendant, further answering, states that the said Trustee and the said Railroad have not by adverse possession acquired any title in or to the said Oil, Gas, or Other Minerals, in, or under the said premises; and

(8)

This Defendant, further answering, states that the said Trustee and the said Missouri-Illinois Railroad is not now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to, and denies that the Trustee and the said Railroad Company is now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to; and

(9)

This Defendant, further answering, denies that numerous oil wells have been drilled in close proximity to Trustee's right of way, and that unless prompt action be taken to re- [fol. 68] move the oil underlying the said right of way it will be drawn into the wells on adjoining lands and that the value thereof will forever be lost to the Stockholders and Creditors of the Missouri-Illinois Railroad Company; and this Defendant, further answering, states the facts to

be that the Stockholders, Creditors of the said Missouri-Illinois Company, and the said Railroad Company and the Trustee thereof, have no right, title, or interest in the Oil or Gas underlying the right of way of the said Company; and

(10)

This Defendant, further answering, denies that the Court of Bankruptcy by reason of its Trustee's possession of said property, has jurisdiction of said property under Section Seventy-Seven (77) of the Bankruptcy Act to determine all questions respecting title thereto, and denies that pending the determination of said Title, said Court has jurisdiction to instruct and direct the Trustee to take such action as the Court may deem advisable to prevent waste of said Oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined; and denies that the said Court has authority to direct that the expenses thereof be paid out of the proceeds of the Oil so removed, and denies that there should be any drilling on the right of way prior to the adjudication of adverse claims respecting the title in this said proceeding; and this Defendant denies that this Court has jurisdiction in this proceedings to determine title to the Oil, Gas, and Other Minerals under said right of way, and denies that the said Trustee is or ever has been in possession of the Oil, Gas, or Other Mnnerals under said right of way; and

(11)

This Defendant, further answering, denies that the Blackstock Oil Company, or any other Company, under Lease from the Trustee, has any right, power, or authority to drill upon the said right of way for oil or gas, and further states that the Bid of the said Blackstock Oil Company is not attached to the Petition in this cause, and that the Petition, therefore, does not show what it is proposed to do with reference to drilling on said right of way, and that it would [fol. 69] be extremely unfair and unjust to permit the drilling of said premises for Oil and Gas pending determination of the title of the adverse claimants and to permit payment of the expenses thereof out of the oil recovered, when the effect of such an order would be to confiscate the property of this Defendant and the other Defendants without any compensation therefor and permit the Drilling Contractor

to exploit the property of said Defendant, and the other Defendants, and to indulge in a large amount of drilling and expense upon the said premises at the cost of this Defendant, and that there is no Law, Statute, or authority under the law authorizing such a procedure which would amount to a confiscation of the property of this Defendant without giving it an opportunity to be heard; and

(12)

This Defendant, further answering, denies that the Court should enjoin this Defendant from asserting any title in and to the land or to the Mineral, Oil, or Gas Deposits in and under said right of way or extracted therefrom, and denies that the Court should find and decree that all Oil, Gas, and Mineral Rights in and under aforesaid right of way in and across the aforesaid Section Twenty (20), Town- Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, is now vested in the Petitioner, as Trustee of the Missouri-Illinois Railroad Company; and this Defendant, further answering, denies that the Trustee should be authorized to forthwith execute a contract with the Blackstock Oil Company, substantially in the form of Exhibit "A" filed with said Petition, and as therein provided, to make advances and payments out of funds in petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to otherwise carry out the terms and conditions of said contract; and this Defendant, further answering, denies that the Trustee, pending determination of adverse claims of title should be authorized to sell and convey and to transfer title to any Oil or Gas removed from the aforesaid premises free and clear of all liens or claims of others predicated upon alleged adverse ownership of any rights in the said premises; and

[fol. 70] (13)

This Defendant, further answering, denies that the Trustee should be directed to keep separate account of the expense of drilling each well, and to keep separate account of all Oil and Gas removed from each separate tract to which adverse claim is herein asserted, and denies that Trustee, after paying the expenses provided for in Article I of the Contract herewith filed as Exhibit "A", and such other expenses as may be reasonably necessary in removing, con-

serving and marketing the Oil or Gas from said premises, should be allowed to reimburse himself therefor out of the proceeds of the sale of said Oil and/or Gas; and this Defendant, further answering, denies that the Trustee should be directed to hold the remainder of said proceeds for the account of whom concerned, as may hereafter be determined by appropriate orders of this Court; and denies that the Trustee of the Railroad is entitled to the Oil or Gas in or under the said premises; and denies that the Trustee or the Railroad is entitled to drill for oil or gas on the said right of way, and states the fact to be that the Charter of the said Railroad Company recognizes and recites that the said Railroad Company had only the right to acquire a right of way or surface easement for Railroad Purposes over the said premises, and had no right to acquire the fee simple title to the Oil, Gas, and Other Minerals thereunder; and

(14)

This Defendant, further answering, denies that the Petition is positively verified; and that the Trustee merely verified said Petition on information and belief, and merely alleges on information and belief that the Trustee has title to the Oil, Gas and Other Minerals under the said premises, and that, under such an allegation and verification, this Court has no right, power, or authority to issue a temporary restraining order as against this Defendant, and has no right, power or authority to authorize the Trustee to proceed to drill for Oil and Gas under the said premises; and

(15)

This Defendant, further answering, states that the said Petition shows upon its face that any rights that the said [fol. 71] Trustee and said Railroad Company may have in the railroad right of way described in said Petition, is merely a surface easement, and that the said Petitioner and the said Railroad Company have no right, title or interest in, or to the Oil or Gas or other Minerals under the said Railroad right of way, and have no right to drill for Oil or Gas upon the said Railroad right of way; and further, no summons have been issued for the landowners and owners of mineral interests under said right of way and that, therefore, said land owners and owners of said mineral interests are not

properly before the Court, and that this Court, in addition to all the other reasons heretofore urged has no jurisdiction to determine the question of title as to these premises for want of necessary parties before the Court.

Magnolia Petroleum Company, Defendant, by Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, and Craig & Craig, by Craig Van Meter, Attorneys for said Defendant. Cobbs, Logan, Roos & Armstrong, Tenth Floor, Mississippi Valley Trust Building, 506 Olive Street, St. Louis, Missouri, and Craig & Craig, 1803-1805-1807 Broadway Avenue, Mattoon, Illinois, Attorneys for Defendant.

Copy of above answer received this 28 day of November, 1938.

Russell J. Dearmont, Counsel for Trustee, Per N. J. Stevens.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES DISTRICT COURT

ANSWER OF THE OHIO OIL COMPANY TO PETITION FOR DETERMINATION OF TITLE AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT OF WAY OF MISSOURI PACIFIC RAILROAD COMPANY NEAR SALEM, ILLINOIS—Filed November 28, 1938

[Answer No. 1167-E]

Now comes The Ohio Oil Company, by Cobbs, Logan, Roos & Armstrong and Craig & Craig, its Attorneys, and as answer to the Petition of the Trustee in this cause, represents to the Court as follows:

(1)

This Defendant denies that in these proceedings, on June 30th, 1933, the Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the Laws of the State of Missouri, and doing business in the State of Illinois, became a subsidiary debtor in these pro-

ceedings, and denies that the said Guy A. Thompson, Trustee, is now the duly appointed, qualified and acting Trustee of said subsidiary debtor.

(2)

This Defendant, further answering, neither admits nor denies that by Order heretofore entered in these proceedings, being Order No. 122, Record Page 789, and Order No. 407, Record Page 3157, said Trustee had been granted blanket authority to enter into Gas and Oil Leases and to contract for the drilling of oil wells on the rights of way of the various debtor Companies, but this Defendant, further answering, states the facts to be, that if such Order was entered that the Court was without jurisdiction to enter any such Order with reference to the rights of way in Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, for the reason that parties who were necessary and interested in the said proceedings, viz., the landowner, who held the fee simple title to the said premises covered by the right of way, owners of part interest in the oil and gas under said right of way, and this Defendant were not made parties to these proceedings, nor served prior to the time of entry of any such Order granting any such blanket authority, and that, therefore, any alleged blanket Order was null [fol. 73] and void and of no force and effect for the reason that the said Missouri-Illinois Railroad Company only held an easement over said lands as to its right of way and did not own or have title to the minerals thereunder.

(3)

This Defendant, further answering, denies that the Trustee has the right, or had the right, to solicit bids for lease of Oil Rights upon that part of the right of way of the Missouri-Illinois Railroad which ranges from sixty (60) to sixty-six (66) feet in width and extends diagonally Northeast to Southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

(4)

This Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owners, Martha J. Young, a widow, Mabel C. Young, spinster, Benjamin F. Young, Rueben Young and Jesse R. Young, covering the southeast quarter of the northwest quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right to and fee simple ownership of the Oil, Gas and Other Minerals under the right of way of the said Railroad Company where the said right of way crosses the southeast quarter of the northwest quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states that the said Martha J. Young, a widow, Mabel C. Young, spinster, Benjamin F. Young, Rueben Young and Jesse R. Young have the fee simple ownership of the said Oil and Gas and other Minerals under the right of way of the said Railroad Company through the southeast quarter of the northwest quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illi-[fol. 74] nois; and this Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owners, Lula Young, a widow, and Roger C. Young, covering the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right and fee simple ownership of the Oil, Gas and Other Minerals under the right of way of the said Railroad Company where the said right of way crosses the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant, further answering, states that the said Lula Young, a widow, and Roger C. Young have the fee simple ownership of the said Oil and Gas and Other Minerals under the right of way of the said Railroad Company through the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian,

Marion County, Illinois, and that said Martha J. Young, Mabel C. Young, Benjamin F. Young, Rueben Young, Jesse R. Young, Lula Young and Roger C. Young, have not been properly served with summons in this proceedings and are not before this Court.

(5)

This Defendant, further answering, denies that the Missouri-Illinois Railroad Company by conveyances and decrees of record had at the time it became subsidiary debtor in these proceedings as aforesaid, and that the Trustee has now succeeded to all of the title hereinabove described, originally vested in The Centralia and Chester Railroad Company, a predecessor railroad company heretofore owning and operating the Line of Railroad in Marion County, Illinois, now owned and operated by Petitioner, as Trustee and denies that the Petitioner Trustee and the Missouri-Illinois Railroad Company have acquired any interest in the said Oil and Gas and Other Minerals under the said right of way of the Railroad through adverse possession, but states that the said Railroad has no right to the Oil, Gas, or Other Minerals under its said right of way either by conveyance or by adverse possession.

[fol. 75] (6)

This Defendant, further answering, admits that the following conveyances of right of way appear of record in the Recorder's Office of Marion County, Illinois, but states that said conveyances do not convey the right to the Oil, Gas or Other Minerals under the tracts of land described in the following conveyances, viz.:

Warranty Deed dated January 28th, 1898, recorded November 5, 1900, at Page 533, in Volume 60 of Deed Records, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of Three Hundred Dollars ($300.00), to the The Centralia & Chester Railroad Company, the following described right of way in Marion County, Illinois:

"A strip of ground for right of way for said Company sixty (60) feet wide over and across the North One-Half of the Northeast Quarter of Section Twenty (20), Town-Two (2) North, Range Two (2) East of the Third Principal Meridian, where said Railroad is now located";

Warranty Deed dated August 13th, 1896, recorded November 19th, 1897, at Page 261, in Volume 55 of Deed Records, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of One Hundred Fifty Dollars ($150.00) conveyed to The Centralia & Chester Railroad Company the following described right of way in Marion County, Illinois:

"A strip of land for right of way for said Railroad Company sixty (60) feet wide over and across the southwest quarter of the northeast quarter of Section Twenty (20), Town- Two (2) North, Range Two (2) East of the Third Principal Meridian,"

but that the said conveyance vested only an easement for railroad purposes over said tract of land, and that the title to the said minerals remains in the landowners, William Young and Emma Young, his wife, and that the Magnolia Petroleum Company is the owner of an Oil and Gas Lease which covers the whole of the southwest quarter of the northeast quarter of said Section Twenty (20) which covers and includes the Oil, Gas and Other Minerals under the strip of land hereinabove last described, and that the Rail- [fol. 76] road Company has no right, title, or interest to the said Oil and Gas and other Minerals thereunder; and

Warranty Deed dated August 14th, 1896, recorded November 19, 1897, in Volume 55, at Page 260, of the Record of Deeds, Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of One Hundred Dollars ($100.00) conveyed to The Centralia & Chester Railroad Company, the following described right of way in Marion County, Illinois, to-wit:

"A strip of ground sixty-six (66) feet wide for right of way for said Railroad Company over and across the east one-half of the northwest quarter of the southwest quarter of Section Twenty (20), Town- Two (2) North, Range Two (2) East of the Third Principal Meridian";

but that the said conveyance did not pass title to the Oil and Gas and Other Minerals and that this Defendant, The Ohio Oil Company is the owner of an Oil and Gas Lease from the landowner owning the fee simple title and the Oil, Gas and Other Minerals under the right of way of the said Railroad Company hereinabove last described, and that the

said Railroad Company has no right to drill for Oil or Gas or to remove the same from under this said right of way; and

Warranty Deed dated January 3, 1898, recorded January 25, 1898, at Page 577, in Volume 56 of Deed Records of Marion County, Illinois, wherein Caroline Rusler, a widow, for the consideration of One Hundred Twenty Dollars and Forty Cents ($120.40) conveyed to the The Centralia & Chester Railroad Company a right of way over and across the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground for right of way for said Company, sixty (60) feet wide over and across the southeast quarter of the northeast quarter and the west one-half of the northwest quarter of the southwest quarter and the southeast quarter of the northwest quarter all of said lands in Section Twenty (20) Town Two (2) North, Range Two (2) East of the Third Principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located;"

[fol. 77] and that the said Deed did not convey the Oil, Gas and Other Minerals under the said strip of land therein described, but that the title thereto remained in the landowner, and that this Defendant, The Ohio Oil Company, holds an Oil and Gas Lease covering the fee simple title in and to the premises described as: West One Half of the Northwest Quarter of the Southwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Twenty (20) which gives it the right, under the terms of its Lease, to prospect and develop the premises for Oil and Gas subject to a one-eighth (⅛th) royalty interest in the owner of the fee, and that at the time the said Caroline Rusler, a widow, made the aforesaid Deed, hereinabove last described to said Railroad Company, that the said Caroline Rusler was the owner of an undivided one-half (½) interest only in the fee in said premises, and that the said Caroline Rusler, by her Deed could not convey the title even for an easement as to the other one-half (½) interest in the said real estate, as to which she did not hold title, and that the said Deed of the said Caroline Rusler did not purport to convey a fee simple interest in said premises, but only an easement therein for the construction of the said railroad right of way.

(7)

This Defendant, further answering, states that although the said Railroad has been in possession of the said premises and has used the same for railroad right of way and has laid railroad tracks over the said premises, still that the said Railroad and the said Trustee have not been in the open, actual, visible and exclusive possession of the Oil, Gas and Other Minerals under the said premises, and have never been in the actual, visible, and exclusive and open possession of the said Oil, Gas and Other Minerals under the said premises;

And this Defendant, further answering, states that the said Trustee and the said Railroad have not by adverse possession acquired any title in or to the said Oil, Gas or Other Minerals in or under the said premises; and

(8)

This Defendant, further answering, states that the said Trustee, and the said Missouri-Illinois Railroad, is not now [fol. 78] lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to, and denies that the Trustee, and the said Railroad Company is now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to; and

(9)

This Defendant, further answering, denies that numerous Oil Wells have been drilled in close proximity to Trustee's right of way, and that unless prompt action be taken to remove the Oil underlying the said right of way it will be drawn into the wells on adjoining lands and that the value thereof will be forever lost to the Stockholders and Creditors of the Missouri-Illinois Railroad Company; and this Defendant, further answering, states the facts to be that the Stockholders, Creditors, of the said Missouri-Illinois Company, and the said Railroad Company and the Trustee thereof, have no right, title, or interest in the Oil or Gas underlying the right of way of the said Company; and

(10)

This Defendant, further answering, denies that the Court of Bankruptcy by reason of its Trustee's possession of said

property, has jurisdiction of said property under Section Seventy-Seven (77) of the Bankruptcy Act, to determine all questions respecting title thereto, and denies that pending the determination of said Title, said Court has jurisdiction to instruct and direct the Trustee to take such action as the Court may deem advisable to prevent waste of said Oil and to recover and salvage it for the interest of the owners as their rights may be by this Court hereinafter determined; and denies that the said Court has authority to direct that the expense thereof be paid out of the proceeds of the Oil so removed, and denies that there should be any drilling on the right of way prior to the adjudication of adverse claims respecting the title in this said proceeding; and this Defendant denies that this Court has jurisdiction in this proceedings to determine title to the Oil, Gas and Other Minerals under said right of way, and denies that the said Trustee is or ever has been in possession of the Oil, Gas and Other Minerals under said right of way; and

[fol. 79] (11)

This Defendant, further answering, denies that the Blackstock Oil Company, or any other Company, under Lease from said Trustee, has any right, title, power or authority to drill upon the said right of way for Oil or Gas, and further states that the Bid of the said Blackstock Oil Company is not attached to the Petition in this cause, and that the Petition, therefore, does not show what it is proposed to do with reference to drilling on said right of way, and that it would be extremely unfair and unjust to permit the drilling of said premises for Oil and Gas pending determination of the title of the adverse claimants and to permit payment of the expenses thereof out of the proceeds from Oil recovered, when the effect of such an Order would be to confiscate the property of this Defendant and the other Defendants without any compensation therefor and permit the Drilling Contractor to exploit the property of said Defendant, and the other Defendants, and to indulge in a large amount of drilling and expenses upon the said premises when there is no Law, Statute, or authority under the Law authorizing such a procedure, which would amount to a wrongful confiscation of the Oil and Property of this Defendant; and

(12)

This Defendant, further answering, denies that the Court should enjoin this Defendant from asserting any title in and to the land or to the Mineral, Oil or Gas Deposits in and under said right of way or extracted therefrom, and denies that the Court should find and decree that all Oil, Gas and Mineral Rights in and under aforesaid right of way in and across the aforesaid Section Twenty (20), Town-Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, is now vested in the Petitioner, as Trustee of the Missouri-Illinois Railroad Company; and this Defendant, further answering, denies that the Trustee should be authorized to forthwith execute a contract with the Blackstock Oil Company, substantially in the form as Exhibit "A" filed with said Petition, and as therein provided, to make advances and payments out of funds in Petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to other-[fol. 80] wise carry out the terms and conditions of said Contract; and this Defendant, further answering, denies that the Trustee, pending determination of adverse claims of title should be authorized to sell and convey and to transfer title to any Oil or Gas removed from the aforesaid premises, free and clear of all liens or claims of others, predicated upon alleged adverse ownership of any rights in the said premises; and says that such an order, if made, would be void; and this Defendant, further answering, denies the right of the Trustee and the authority of the Court to dissipate the assets of the Railroad Company by contracting for the expenditure of large sums of money in a line of business foreign to that for which it was incorporated, and for which it might never be reimbursed, to exploit right of way lands for the production of Oil and Gas to which it has no title, thereby causing great damage to the rightful owners of such Oil and Gas, for which it would be held to account.

(13)

This Defendant, further answering, denies that the Trustee should be directed to keep separate account of the expense of drilling each well, and to keep separate account of all Oil and Gas removed from each separate tract to which adverse claim is herein asserted, and denies that

Trustee, after paying the expenses provided for in Article I of the Contract therewith filed with said Petition as Exhibit "A," and such other expenses as may be reasonably necessary in removing, conserving and marketing the Oil or Gas from said premises, should be allowed to reimburse himself therefor out of the proceeds of the sale of said Oil and/or Gas; and this Defendant, further answering, denies that the Trustee should be directed to hold the remainder of said proceeds for the account of whom concerned, hereafter to be determined by appropriate orders of this Court; and denies that the Trustee of the Railroad is entitled to the Oil or Gas in or under the said premises; and denies that the Trustee or the Railroad is entitled to drill for Oil or Gas on the said right of way, and states the fact to be that the Charter of the said Railroad Company recognizes and recites that the said Railroad Company had only the right to acquire a right of way or surface easement for railroad purposes over the said premises, and had no right [fol. 81] to acquire the fee simple title to the Oil, Gas and Other Minerals thereunder; and

(14)

This Defendant, further answering, denies that the Petition is positively verified; and that the Trustee merely verifies said Petition on information and belief, and merely alleges on information and belief that the Trustee has title to the Oil, Gas and Other Minerals under the said premises, and that, under such an allegation and verification, this Court has no right, power, or authority to issue a temporary restraining order as against this Defendant, and has no right, power, or authority to authorize the Trustee to proceed to drill for Oil and Gas under the said premises; and

(15)

This Defendant, further answering, states that the said Petition shows upon its face that any rights that the said Trustee and said Railroad Company may have in the railroad right of way described in said Petition is merely a surface easement and that the said Petitioner and the said Railroad Company have no right, title, or interest in or to the Oil or Gas, or Other Minerals under the said Railroad right of way, and have no right to drill for oil or gas upon

the said Railroad right of way; and, further, no summons have been issued for the landowners and owners of mineral interests under said right of way, and that, therefore, said landowners and owners of said mineral interests are not properly before the Court, and that this Court, in addition to all the other reasons heretofore urged, has no jurisdiction to determine the question of title as to these premises for want of necessary parties before the Court.

The Ohio Oil Company, Defendant. By Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, and Craig & Craig, by Craig Van Meter, Attorneys for [fol. 82] said Defendant. Cobbs, Logan, Roos & Armstrong, Tenth Floor, Mississippi Valley Trust Building, 506 Olive Street, St. Louis, Missouri, and Craig & Craig, 1803-1805-1807 Broadway Avenue, Mattoon, Illinois, Attorneys for Defendant.

Copy of above answer received this 28th day of November, 1938.

Russell L. Dearmont, Counsel for Trustee, per N. J. Stevens.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF FILING OF SEPARATE PETITIONS FOR APPEAL OF MAGNOLIA PETROLEUM COMPANY AND OHIO OIL COMPANY, ETC.—December 10, 1938

Separate petitions for appeal to U. S. C. C. A., Eighth Circuit and for supersedeas, as well as separate assignment of errors on such proposed appeals of the Ohio Oil Co., and Magnolia Petroleum Co., from order entered November 14, 1938, authorizing Guy A. Thompson, Trustee for Missouri-Illinois Ry. Co. to contract for drilling wells on and removal and marketing of oil and gas taken from right of way of debtor at Salem, Illinois, etc., filed.

In United States District Court

Record Entry Showing Filing of Separate Notices of Appeal of Magnolia Petroleum Oil Co., and Ohio Oil Co., and Presentation of Separate Petitions for Appeals; etc.—December 12, 1938

Separate notices of appeal to U. S. C. C. A. Eighth Circuit, of the Ohio Oil Co., and Magnolia Petroleum Co., from order entered on November 14, 1938, authorizing Guy A. Thomp-
[fol. 83] son, etc., to deal and contract with the Blackstock Oil Co., in relation to the oil and gas underlying the right of way of the Missouri-Illinois Railroad Company, at Salem, Illinois, etc., filed in duplicate and a copy of each of said notices mailed by the Clerk of this Court to Guy A. Thompson, Trustee, etc., pursuant to provisions of Rule 73 of Rules of Civil Procedure.

Separate costs bonds of the Ohio Oil Co., and Magnolia [Petrolaum] Co., on such proposed appeals in the sum of $250.00 each, presented, approved and filed.

Separate petitions of The Ohio Oil Co., and Magnolia Petroleum Co., for allowance of appeals to U. S. C. C. A., Eighth Circuit, from order entered on November 14, 1938, authorizing Guy A. Thompson, Trustee, etc., to deal and contract with the Blackstock Oil Co., in relation to the oil and gas underlying the right of way of the Missouri-Illinois Railroad Co., at Salem, Ill., etc., together with separate assignment of errors on such proposed appeals, presented, and separate orders filed granting said appeals but denying supersedeas, and directing petitioners to file herein within ten days their cost bonds on appeal in the sum of $250.00 each, to be approved by the Court. Separate cost bonds on appeal of The Ohio Oil Co., and Magnolia Petroleum Co., in the sum of $250.00 each, presented approved and filed. Separate citations issued and filed.

IN UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

PETITION FOR APPEAL OF MAGNOLIA PETROLEUM COMPANY—Filed December 10, 1938

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Debtor

In Proceedings for the Reorganization of a Railroad

[fol. 84] Petition #1167

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor, Plaintiff,

vs.

THE OHIO OIL COMPANY, KINGWOOD OIL COMPANY, MAGNOLIA PETROLEUM COMPANY et al., Defendants

To the Honorable George H. Moore, United States Judge, for the Eastern Division, Eastern Judicial District of Missouri:

Your petitioner, Magnolia Petroleum Company, a corporation, believing itself aggrieved by the order of this court entered in the above entitled cause on November 14, 1938, authorizing Guy A. Thompson, Trustee for Missouri-Illinois Railroad Company, to contract for the drilling of wells on and the removal and marketing of oil and gas taken from the premises described in Petition No. 1167 filed herein, and directing that the proceeds from the sale of such oil and gas, after deducting therefrom the expenses of drilling for, and removing, conserving and marketing said oil and gas be turned over to said Trustee and vesting title to said oil and gas underlying or removed from said premises in said Trustee, with the right to convey said title free and clear of all claims, and enjoining and restraining this defendant and others from interfering with the drilling of said wells and from asserting or attempting to enforce, other than in these proceedings, any claim to said premises and the oil and gas under the same and from attacking or interfering

with the title of any purchaser of said oil and gas, prays an appeal from said order to the United States Circuit Court of Appeals for the Eighth Circuit. The errors upon which said appeal is based are specified in the assignment of errors which is filed herewith and made a part hereof.

Your petitioner prays further that a citation be issued to the said Guy A. Thompson, Trustee, directing him to appear before the United States Circuit Court of Appeals for the Eighth Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers, duly authenticated, upon which said order was made, be transmitted to the [fol. 85] United States Circuit Court of Appeals for the Eighth Circuit.

Your petitioner prays further that, pending this appeal, this Court grant it a stay of said order and fix the amount of the supersedeas bond which your petitioner shall give therefor.

Magnolia Petroleum Company, by Craig & Craig, and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Attorneys for Defendant, Magnolia Petroleum Company.

Duly sworn to by Thos. H. Cobbs. Jurat omitted in printing.

Copy received Dec. 9, 1938
Guy A. Thompson, Trustee Mo. Ill. R. R. Co., Debtor, by Thos. T. Railey, Atty. for Trustee.

[fol. 86] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS ON APPEAL OF MAGNOLIA PETROLEUM COMPANY—Filed December 10, 1938

Comes now Magnolia Petroleum Company, a corporation, appellant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of this appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order of this Court entered by this Court in this cause on the 14th day of November, 1938.

I

The District Court erred in entering the order of November 14, 1938, on the petition of Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, because the District Court is without jurisdiction in the premises and was acting in excess of and beyond its jurisdiction for the following reasons:

(1) It affirmatively appears from the allegations contained in said petition that this is a controversy in equity between said Trustee, as such, and adverse claimants, including this appellant, concerning property acquired or claimed by said Trustee, and that, as made and provided by Title 11, Section 46, U. S. C. A., as amended June 22, 1938, Chapter 575, Sec. 1, 52 Stat. 854, said proceedings should have been instituted as a separate cause of action in the same manner as the subsidiary debtor, Missouri-Illinois Railroad Company, might have instituted them if the proceedings in bankruptcy had not been instituted.

(2) That the proceeding and hearing leading up to the order of November 14, 1938 here appealed from were had over the objection of this appellant to the jurisdiction of the District Court and that, therefore, as made and provided by Title 11, Sec. 46, U. S. C. A., as amended June 22, 1938, Chapter 575, Sec. 1, 52 Stat. 854, the District Court, in entering said order, was without jurisdiction in the premises and was acting in excess of and beyond its jurisdiction.

(3) The jurisdiction of the District Court, as provided in Title 11, Sec. 205(a), U. S. C. A., depends upon whether or not petitioner, Trustee, had possession of or title to the [fol. 87] subject matter of the controversy, namely, oil and gas underlying the real estate described in said petition, and that the determination of this question depends upon the construction given or to be given to the deeds set forth in said petition and the facts shown in a final hearing, and that it appears from the record in this cause that, until the time of entering the order here appealed from, the Judge of the United States District Court had not had a final hearing on and had not properly determined this question, which was the basis of his jurisdiction to entertain this cause.

(4) The United States District Court, in the order appealed from, purports, beyond and in excess of its juris-

diction, to vest in the Trustee good and sufficient legal title to any and all oil and gas underlying or removed from the premises described in said petition, although, on the face of said petition, it affirmatively appears that there is presently existing a dispute as to the title to and ownership of said oil and gas.

(5) The United States District Court, acting beyond and in excess of its jurisdiction, by the order complained of, authorized said Trustee to enter into contracts with Blackstock Oil Company, a stranger to this record, and make arrangements for the drilling of wells and payment therefor, the removal and marketing of oil and gas that may be taken from said premises described in said petition, although it affirmatively appears from said petition that there is presently existing a dispute as to the title and ownership of said oil and gas.

(6) It appears from the record in this proceeding that there are landowners and owners of mineral interests under the right-of-way of said Railroad who were not before the Court at the time of the entry of said order of November 14, 1938, and that appellant urged that the District Court had no jurisdiction to enter said order of November 14, 1938 because of lack of necessary parties and because said landowners and mineral owners were not before said Court.

II

The District Court erred in finding in said order appealed from "that immediate action is necessary to conserve the [for 88] oil supply underlying said property, for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court" in that there was no substantial evidence or proof that any other drilling operations adjacent to said property did or could drain any oil or gas lying underneath said premises. The preponderating evidence was to the contrary.

III

Said order of November 14, and all proceedings had leading up to said order, are a nullity, because it appears from the record that the United States District Court had and could acquire no jurisdiction over the subject matter of this

proceeding, namely, the oil and gas which may underlie the premises described in said petition and which is situated in the State of Illinois and out of the jurisdiction of said Court.

IV

The United States District Court erred and acted in excess of its jurisdiction in granting injunctive relief in favor of the Blackstock Oil Company, as provided in paragraph six of said order, because it affirmatively appears from said petition and proceedings that said Blackstock Oil Company was not a party to these proceedings and is a stranger to these proceedings and because there was no legal or equitable justification for said injunction.

V

The United States District Court erred and acted in excess of its jurisdiction and beyond its jurisdiction in purporting to enter an interlocutory order, in regard to the subject matter of this controversy, namely oil and gas beneath the premises described in said petition, because it affirmatively appears from said order and this record that said order is in fact a final order as to all oil and gas, which may be taken from said premises under and in accordance with said order, and that said final order amounts to the taking of this appellant's property without due process of law and without any adequate hearing and contrary to the 14th Amendment to the Constitution of the United States.

[fol. 89]

VI

The United States District Court erred in attempting to vest in Trustee the title to and authorize Trustee to deal in relation to any oil or gas, which might be found beneath the premises described in said petition or produced from said premises, until said Court had determined the question of the ownership of the fee simple title in and to the premises from which said oil and gas might be produced.

VII

The United States District Court erred in entering the order of November 14, 1938, because the record in this proceeding shows that Trustee was not and is not the owner of the oil and gas under the land described in his petition

and was not and is not in possession of said oil and gas and should not have been given any title to or control over the same.

VIII

The United States District Court erred in finding that Trustee was the owner and in possession of the property in controversy, i. e., the oil and gas under the property described in his petition, because the deeds mentioned in his petition gave only an easement for a right-of-way and because the record shows there was a real dispute which could not be decided without a final hearing.

IX

The United States District Court erred in entering an injunction against appellant because the record in this proceeding shows that appellant claims to own the oil and gas under some of the land described in Trustee's petition and also shows that Trustee owns only an easement for a right-of-way over said land and does not own the oil and gas under said land.

X

The United States District Court erred in entering said order of November 14, 1938, because that order gave to a stranger to this record, Blackstock Oil Company, the right to remove the real subject matter of this controversy, the oil and gas under the right-of-way of the Missouri-Illinois [fol. 90] Railroad, and also gave said Blackstock Oil Company the right to sell said oil and gas at any price without even requiring that all sales should be made at the fair market value of the oil and gas so sold at the well or wells when and where the same was produced and marketed.

XI

That the United States District Court erred in entering said order of November 14, 1938, because that order was entered on the petition filed herein, which petition had not been verified absolutely to be true, but was verified only on belief.

Wherefore, Magnolia Petroleum Company prays that the said order of November 14, 1938, entered herein by the United States District Court for the Eastern Division of

the Eastern Judicial District of Missouri, be reversed, as to Magnolia Petroleum Company, and that this cause be remanded to said United States District Court with instructions as to further proceedings herein, and for such other and further relief as may be just and proper in the premises.

Respectfully submitted, Magnolia Petroleum Company, by Craig & Craig and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Attorneys for Magnolia Petroleum Company.

Dated at St. Louis, Missouri, this 10th day of December, 1938.

Duly sworn to by Thos. H. Cobbs jurat omitted in printing.

[fol. 91] Copy received Dec. 9, 1938.
Guy A. Thompson, Trustee Mo. Ill. R. R. Co., Debtor,
by Thos. T. Railey, Atty. for Trustee.

IN UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL TO MAGNOLIA PETROLEUM COMPANY—Filed December 12, 1938

The petition of Magnolia Petroleum Company, a corporation, for an appeal from the order entered in this cause on November 14, 1938, directing and authorizing Guy A. Thompson, Trustee for Missouri-Illinois Railroad Com- [fols. 92-94] pany, to contract with Blackstock Oil Company in relation to oil and gas under the right-of-way of the Missouri-Illinois Railroad Company near Salem, Illinois, and authorizing said Trustee to remove said oil and gas and vesting said Trustee with the title to any and all of said oil and gas which might be removed from said real estate and enjoining Magnolia Petroleum Company and others from exercising any rights which they may have in and to said oil and gas, having been duly considered, said petition for appeal from said order is hereby granted and an appeal is hereby allowed without [supersedeas] to the United States Circuit Court of Appeals for the Eighth Circuit upon

the Magnolia Petroleum Company giving a cost bond in the sum of $250.00 within ten days from the date of the entry of this order, conditioned as required by law, to be approved by this Court or one of the judges thereof and that a citation upon this appeal issued directed to Guy A. Thompson, Trustee, and made returnable 40 days from the day on which the same is issued.

Geo. H. Moore, Judge of the United States District Court.

Dated at St. Louis, Missouri this 12th day of December, 1938.

Bond on appeal for $250.00, approved and filed December 12, 1938, omitted in printing.

[fol. 95] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

NOTICE OF APPEAL OF MAGNOLIA PETROLEUM COMPANY—Filed December 12, 1938

Notice is hereby given that Magnolia Petroleum Company, a corporation, one of the defendants in the above entitled proceeding, brought by Guy A. Thompson, Trustee, for determination of title and for advice and direction respecting certain proposed oil operations on the right-of-way of Missouri-Illinois Railroad near Salem, Illinois, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the order entered herein on November 14, 1938 by the Honorable George H. Moore, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, authorizing Guy A. Thompson, Trustee, to deal and contract with the Blackstock Oil Company in relation to the oil and gas underlying the right-of-way of the Missouri-Illinois Railroad in Section 20, Township 2 North, Range 2 East of the 3rd P. M. in Salem Township, Marion County, Illinois, and authorizing the removal of said oil and gas from under said right-of-way, and vesting title to any and all oil and gas

removed from said right-of-way in said Trustee and enjoining Magnolia Petroleum Company, et al., from exercising any of the rights which it may have in and to the oil and gas under said right-of-way; and will ask the United [fols. 96-97] States Circuit Court of Appeals for the Eighth Circuit to vacate said order of November 14 1938 and all parts thereof in so far as said order applies to or affects Magnolia Petroleum Company.

Craig & Craig and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Attorneys for Magnolia Petroleum Company.

Bond on appeal for $250.00, approved and filed December 12, 1938, omitted in printing.

[fol. 98] In United States District Court of the Eastern Division of the Eastern Judicial District of Missouri

[Title omitted]

Statement of Points to be Relied Upon on Appeal of Magnolia Petroleum Company—Filed January 14, 1939

Comes now Magnolia Petroleum Company and states that, on its appeal to the United States Circuit Court of [fol. 99] Appeals for the Eighth Circuit in the above entitled cause, it will rely upon the following points:

I.

The United States District Court erred in entering the order of November 14, 1938, on the petition of Guy A. Thompson, Trustee, from which said order this appeal was taken, for the reason that it was without jurisdiction to enter said order and in entering said order was acting in excess of and beyond its jurisdiction, because:

(1) This is a controversy in bankruptcy between said Trustee, as such, and adverse claimants and should have been instituted as a separate cause of action in the same jurisdiction and in the same manner as the Subsidiary Debtor, Missouri-Illinois Railroad Company, might have

instituted it if these proceedings in bankruptcy had not been filed.

(2) This is not a proceedings by a Trustee in possession within the contemplation of Title 11, Section 205 (a), U. S. C. A.

(3) Under the law of the State of Illinois, even though the deeds set forth in said petition be construed to have conveyed a fee simple title to the Subsidiary Debtor, Missouri-Illinois Railroad Company, neither said Subsidiary Debtor nor its Trustee acquired any possessory right or title to oil and gas underlying said real estate, and therefore the District Court had no jurisdiction to entertain this summary proceedings.

(4) The United States District Court erred, in the order appealed from, in purporting to vest in the Trustee good and sufficient legal title to any and all oil and gas underlying or removed from the premises described in said petition, when the Trustee of said Subsidiary Debtor had no such title.

(5) The United States District Court erred, in the order appealed from, in purporting to vest in the Blackstock Oil Company, a stranger to this record, authority to drill for, recover and market oil and gas taken from the premises described in said petition until the Court determined the title to and rights in said premises.

[fol. 100] (6) Under the record and evidence, the Court had and could acquire no jurisdiction over the subject matter of this proceeding, namely, the oil and gas which might be found under or recovered from the premises described in said petition and located in the State of Illinois.

II

The United States District Court erred in failing to dismiss the Trustee's petition, because under the undisputed evidence, the Trustee's complaint is without equity.

III

The United States District Court erred in granting a temporary injunction in this cause, because there was no substantial evidence or proof that any other drilling operations adjacent to said property were threatened, or, if carried on, could drain any oil or gas from said premises.

IV

Said order of November 14, 1938, here appealed from, authorizes the taking and disposition of Appellant's property without due process of law and without any adequate and final hearing, contrary to the Fourteenth Amendment to the Constitution of the United States.

V

The United States District Court erred in entering said order of November 14, 1938, here appealed from, because the deeds described in the Trustee's petition and received in evidence gave only an easement for a right of way over and across and not the fee simple title to the premises described in said deeds, and because the language used in said deeds and the circumstances under which they were given clearly show that the grantors therein intended to and did give to the grantee, Railroad Company, only the right to build and operate a railroad over and across the property described therein and not to use said property for any other purpose whatsoever.

VI

Said order of November 14, 1938, here appealed from, is unjust and inequitable and erroneous in that it authorizes a stranger to the record to remove, dispose of and sell, [fol. 101] without restriction, the real subject matter of the controversy, before final determination of the rights of the parties.

Magnolia Petroleum Company, by Craig & Craig and Cobbs, Logan, Roos and Armstrong, by Thos. H. Cobbs, Its Attorneys.

Copy received 1/14/39.

Thos. T. Railey.

In United States District Court for the Eastern Division of the Eastern Judicial District of Missouri

Petition for Appeal of Ohio Oil Company—Filed December 10, 1938

In the Matter of Missouri Pacific Railroad Company, a Corporation, Debtor

In Proceedings for the Reorganization of a Railroad

No. 6935

Petition #1167

Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor, Plaintiff,

vs.

The Ohio Oil Company, Kingwood Oil Company, Magnolia Petroleum Company, et al., Defendants

To the Honorable George H. Moore, United States Judge, for the Eastern Division, Eastern Judicial District of Missouri:

Your petitioner, The Ohio Oil Company, a corporation, believing itself aggrieved by the order of this court entered in the above entitled cause on November 14, 1938, authorizing Guy A. Thompson, Trustee for Missouri-Illinois Railroad Company, to contract for the drilling of wells on and the removal and marketing of oil and gas taken from the premises described in Petition No. 1167 filed herein, and directing that the proceeds from the sale of such oil and gas, after deducting therefrom the expenses of drilling for, and removing, conserving and marketing said oil and gas be [fol. 102] turned over to said Trustee and vesting title to said oil and gas underlying or removed from said premises in said Trustee, with the right to convey said title free and clear of all claims, and enjoining and restraining this defendant and others from interfering with the drilling of said wells and from asserting or attempting to enforce, other than in these proceedings, any claim to said premises and the oil and gas under the same and from attacking or in-

terfering with the title of any purchaser of said oil and gas, prays an appeal from said order to the United States Circuit Court of Appeals for the Eighth Circuit. The errors upon which said appeal is based are specified in the assignment of errors which is filed herewith and made a part hereof.

Your petitioner prays further that a citation be issued to the said Guy A. Thompson, Trustee, directing him to appear before the United States Circuit Court of Appeals for the Eighth Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers, duly authenticated, upon which said order was made, be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

Your petitioner prays further that, pending this appeal, this Court grant it a stay of said order and fix the amount of the supersedeas bond which your petitioner shall give therefor.

The Ohio Oil Company, by Craig & Craig, and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Attorneys for Defendant, The Ohio Oil Company.

Duly sworn to by Thos. H. Cobbs, jurat omitted in printing.

[fol. 103] Copy received Dec. 9, 1938.
Guy A. Thompson, Trustee. Mo. Ill. R. R. Co., Debtor. By Thos. T. Railey, Atty. for Trustee.

In United States District Court

Assignment of Errors on Appeal of Ohio Oil Company—Filed December 10, 1938

Comes now The Ohio Oil Company, a corporation, appellant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of this appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order of this Court entered by this Court in this cause on the 14th day of November, 1938.

I

The District Court erred in entering the order of November 14, 1938, on the petition of Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, because the District Court is without jurisdiction in the premises and was acting in excess of and beyond its jurisdiction for the following reasons:

(1) It affirmatively appears from the allegations contained in said petition that this is a controversy in equity between said Trustee, as such, and adverse claimants, in-
[fol. 104] cluding this appellant, concerning property acquired or claimed by said Trustee, and that, as made and provided by Title 11, Section 46, U. S. C. A., as amended June 22, 1938, Chapter 575, Sec. 1, 52 Stat. 854, said proceedings should have been instituted as a separate cause of action in the same manner as the subsidiary debtor, Missouri-Illinois Railroad Company, might have instituted them if the proceedings in bankruptcy had not been instituted.

(2) That the proceeding and hearing leading up to the order of November 14, 1938, here appealed from, were had over the objection of this appellant to the jurisdiction of the District Court and that, therefore, as made and provided by Title 11, Sec. 46, U. S. C. A., as amended June 22, 1938, Chapter 575, Sec. 1, 52 Stat. 854, the District Court, in entering said order, was without jurisdiction in the premises and was acting in excess of and beyond its jurisdiction.

(3) The jurisdiction of the District Court, as provided in Title 11, Sec. 203(b), U. S. C. A., depends upon whether or not petitioner, Trustee, had possession of or title to the subject matter of the controversy, namely, oil and gas underlying the real estate described in said petition, and that the determination of this question depends upon the construction given or to be given to the deeds set forth in said petition and the facts shown in a final hearing, and that it appears from the record in this cause that, until the time of entering the order here appealed from, the Judge of the United States District Court had not had a final hearing on and had not properly determined this question, which was the basis of his jurisdiction to entertain this cause.

(4) The United States District Court, in the order appealed from, purports, beyond and in excess of its jurisdic-

tion, to vest in the Trustee good and sufficient legal title to any and all oil and gas underlying or removed from the premises described in said petition, although, on the face of said petition, it affirmatively appears that there is presently existing a dispute as to the title to and ownership of said oil and gas.

[fol. 105] (5) The United States District Court, acting beyond and in excess of its jurisdiction, by the order complained of, authorized said Trustee to enter into contracts with Blackstock Oil Company, a stranger to this record, and make arrangements for the drilling of wells and payment therefor, the removal and marketing of oil and gas that may be taken from said premises described in said petition, although it affirmatively appears from said petition that there is presently existing a dispute as to the title and ownership of said oil and gas.

(6) It appears from the record in this proceeding that there are landowners and owners of mineral interests under the right-of-way of said Railroad who were not before the Court at the time of the entry of said order of November 14, 1938, and that appellant urged that the District Court had no jurisdiction to enter said order of November 14, 1938 because of lack of necessary parties and because said landowners and mineral owners were not before said Court.

II

The District Court erred in finding in said order appealed from "that immediate action is necessary to conserve the oil supply underlying said property, for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court", in that there was no substantial evidence or proof that any other drilling operations adjacent to said property did or could drain any oil or gas lying underneath said premises. The preponderating evidence was to the contrary.

III

Said order of November 14, and all proceedings had leading up to said order, are a nullity, because it appears from the record that the United States District Court had and could acquire no jurisdiction over the subject matter of this proceeding, namely, the oil and gas which may underlie the

premises described in said petition and which is situated in the State of Illinois and out of the jurisdiction of said Court.

[fol. 106] IV

The United States District Court erred and acted in excess of its jurisdiction in granting injunctive relief in favor of the Blackstock Oil Company, as provided in paragraph six of said order, because it affirmatively appears from said petition and proceedings that said Blackstock Oil Company was not a party to these proceedings, and is a stranger to these proceedings and because there was no legal or equitable justification for said injunction.

V

The United States District Court erred and acted in excess of its jurisdiction and beyond its jurisdiction in purporting to enter an interlocutory order, in regard to the subject matter of this controversy, namely oil and gas beneath the premises described in said petition, because it affirmatively appears from said order and this record that said order is in fact a final order as to all oil and gas, which may be taken from said premises under and in accordance with said order, and that said final order amounts to the taking of this appellant's property without due process of law and without any adequate hearing and contrary to the 14th Amendment to the Constitution of the United States.

VI

The United States District Court erred in attempting vest in Trustee the title to and authorize Trustee to deal in relation to any oil or gas, which might be found beneath the premises described in said petition or produced from said premises, until said Court had determined the question of the ownership of the fee simple title in and to the premises from which said oil and gas might be produced.

VII

The United States District Court erred in entering the order of November 14, 1938, because the record in this proceeding shows that Trustee was not and is not the owner of the oil and gas under the land described in his

petition and was not and is not in possession of said oil and gas and should not have been given any title to or control over the same.

[fol. 107]

VIII

The United States District Court erred in finding that Trustee was the owner and in possession of the property in controversy, i. e., the oil and gas under the property described in his petition, because the deeds mentioned in his petition gave only an easement for a right-of-way and because the record shows there was a real dispute which could not be decided without a final hearing.

IX

The United States District Court erred in entering an injunction against appellant because the record in this proceeding shows that appellant claims to own the oil and gas under some of the land described in Trustee's petition and also shows that Trustee owns only an easement for a right-of-way over said land and does not own the oil and gas under said land.

X

That the United States District Court erred in entering said order of November 14, 1938, because that order gave to a stranger to this record, Blackstock Oil Company, the right to remove the real subject matter of this controversy, the oil and gas under the right-of-way of the Missouri-Illinois Railroad, and also gave said Blackstock Oil Company the right to sell said oil and gas at any price without even requiring that all sales should be made at the fair market value of the oil and gas so sold at the well or wells when and where the same was produced and marketed.

XI

That the United States District Court erred in entering said order of November 14, 1938, because that order was entered on the petition filed herein, which petition had not been verified absolutely to be true, but was verified only on belief.

Wherefore, The Ohio Oil Company prays that the said order of November 14, 1938, entered herein by the United States District Court for the Eastern Division of the East-

ern Judicial District of Missouri, be reversed, as to The Ohio Oil Company, and that this cause be remanded to said [fol. 108] United States District Court with instructions as to further proceedings herein, and for such other and further relief as may be just and proper in the premises.

Respectfully submitted, The Ohio Oil Company, By Craig & Craig, and Cobbs, Logan, Rogg & Armstrong, by Thos. H. Cobb, Attorneys for The Ohio Oil Co.

Dated at St. Louis, Missouri, this 10th day of December, 1938.

Duly sworn to by Thos. H. Cobbs. Jurat omitted in printing.

Copy received Dec. 9, 1938.
Guy A. Thompson, Trustee, Mo.-Ill. R. R. Co., Debtor. By Thos. T. Railey, Atty. for Trustee.

[fol. 109] IN UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL TO OHIO OIL COMPANY—Filed December 12, 1938

The petition of The Ohio Oil Company, a corporation, for an appeal from the order entered in this cause on November 14, 1938, directing and authorizing Guy A. Thompson, Trustee for Missouri-Illinois Railroad Company, to contract with Blackstock Oil Company in relation to oil and gas under the right-of-way of the Missouri-Illinois Railroad Company near Salem, Illinois, and authorizing said Trustee to remove said oil and gas and vesting said Trustee with the title to any and all of said oil and gas which might be removed from said real estate and enjoining The Ohio Oil Company and others from exercising any rights which they may have in and to said oil and gas, having been duly considered, said petition for appeal from said order is hereby granted and an appeal is hereby allowed without supersedeas to the United States Circuit

Court of Appeals for the Eighth Circuit upon The Ohio Oil Company giving a cost bond in the sum of $250.00, within ten days from the date of the entry of this order, conditioned as required by law, to be approved by this Court or one of the judges thereof and that a citation upon this appeal issue directed to Guy A. Thompson, Trus-
[fols. 110-111] tee, and made returnable 40 days from the day on which the same is issued.

George H. Moore, Judge of the United States District Court.

Dated at St. Louis, Missouri this 12th day of December, 1938.

Bond on appeal for $250.00, approved and filed December 12, 1938, omitted in printing.

[fol. 112] In United States District Court for the Eastern Division of the Eastern Judicial District of Missouri

[Title omitted]

Notice of Appeal of Ohio Oil Company—Filed December 12, 1938

Notice is hereby given that The Ohio Oil Company, a corporation, one of the defendants in the above entitled pro-
[fols. 113-114] ceeding, brought by Guy A. Thompson, Trustee, for determination of title and for advice and direction respecting certain proposed oil operations on the right-of-way of Missouri-Illinois Railroad near Salem, Illinois, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the order entered herein on November 14, 1938 by the Honorable George H. Moore, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, authorizing Guy A. Thompson, Trustee, to deal and contract with the Blackstock Oil Company in relation to the oil and gas underlying the right-of-way of the Missouri-Illinois Railroad in Section 20, Township 2 North, Range 2 East of the 3rd P. M. in Salem Township, Marion County, Illinois, and authorizing the removal of said oil and gas from under said right-of-way, and vesting title to any and all oil and gas removed

from said right-of-way in said Trustee and enjoining The Ohio Oil Company, et al. from exercising any of the rights which it may have in and to the oil and gas under said right-of-way, and will ask the United States Circuit Court of Appeals for the Eighth Circuit to vacate said order of November 14, 1938 and all parts thereof in so far as said order applies to or affects The Ohio Oil Company.

Craig & Craig, and Cobbs, Logan, Roos & Armstrong,
By Thos. H. Cobbs, Attorneys for The Ohio Oil Co.

Bond on appeal for $250.00, approved and filed Dec. 12, 1938; omitted in printing.

[fol. 115] IN UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL OF OHIO OIL COMPANY—Filed January 14, 1939

[fol. 116] Comes now The Ohio Oil Company and states that, on its appeal to the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause, it will rely upon the following points:

I

The United States District Court erred in entering the order of November 14, 1938, on the petition of Guy A. Thompson, Trustee, from which said order this appeal was taken, for the reason that it was without jurisdiction to enter said order and in entering said order was acting in excess of and beyond its jurisdiction, because:

(1) This is a controversy in bankruptcy between said Trustee as such, and adverse claimants and should have been instituted as a separate cause of action in the same jurisdiction and in the same manner as the Subsidiary Debtor, Missouri-Illinois Railroad Company, might have instituted it if these proceedings in bankruptcy had not been filed.

(2) This is not a proceedings by a Trustee in possession within the contemplation of Title 11, Section 205 (a), U. S. C. A.

(3) Under the law of the State of Illinois, even though the deeds set forth in said petition be construed to have conveyed a fee simple title to the Subsidiary Debtor, Missouri-Illinois Railroad Company, neither said Subsidiary Debtor nor its Trustee acquired any possessory right or title to oil and gas underlying said real estate, and therefore the District Court had no jurisdiction to entertain this summary proceedings.

(4) The United States District Court erred, in the order appealed from, in purporting to vest in the Trustee good and sufficient legal title to any and all oil and gas underlying or removed from the premises described in said peti- [fol. 117] tion, when the Trustee of said Subsidiary Debtor had no such title.

(5) The United States District Court erred, in the order appealed from, in purporting to vest in the Blackstock Oil Company, a stranger to this record, authority to drill for, recover and market oil and gas taken from the premises described in said petition until the Court determined the title to and rights in said premises.

(6) Under the record and evidence, the Court had and could acquire no jurisdiction over the subject matter of this proceeding, namely, the oil and gas which might be found under or recovered from the premises described in said petition and located in the State of Illinois.

II

The United States District Court erred in failing to dismiss the Trustee's petition, because under the undisputed evidence, the Trustee's complaint is without equity.

III

The United States District Court erred in granting a temporary injunction in this cause, because there was no substantial evidence or proof that any other drilling operations adjacent to said property were threatened, or, if carried on, could drain any oil or gas from said premises.

IV

Said order of November 14, 1938, here appealed from, authorizes the taking and disposition of Appellant's property without due process of law and without any adequate and final hearing, contrary to the Fourteenth Amendment to the Constitution of the United States.

V

The United States District Court erred in entering said order of November 14, 1938, here appealed from, because the deeds described in the Trustee's petition and received in evidence gave only an easement for a right of way over and across and not the fee simple title to the premises described in said deeds, and because the language used in said deeds and the circumstances under which they were given [fol. 118] clearly show that the grantors therein intended to and did give to the grantee, Railroad Company, only the right to build and operate a railroad over and across the property described therein and not to use said property for any other purpose whatsoever.

VI

Said order of November 14, 1938, here appealed from, is unjust and inequitable and erroneous in that it authorizes a stranger to the record to remove, dispose of and sell, without restriction, the real subject matter of the controversy, before final determination of the rights of the parties.

VII

Said order of November, 1938, insofar as it applies to the property described in deed of January 3, 1898, recorded January 25, 1898 at page 577 in Volume 56 of Deed Records of Marion County, Illinois, executed by Caroline Rusler, is erroneous because, under the undisputed evidence, said grantor owned only an undivided one-half interest in said property and the owners of said other undivided one-half interest have never conveyed their interest in said property to Missouri-Illinois Railroad Company or its predecessors, nor has the fee simple title thereto been acquired by adverse possession.

The Ohio Oil Company, by Craig & Craig and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Its Attorneys.

Copy received 1/14/39. Thos. T. Railey.

IN DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

Narrative of the Testimony—Filed January 14, 1939

Petition Number 1167

[fol. 119] In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Debtor

In Proceedings for the Reorganization of a Railroad

Number 6935

At a session of Court, held in the District aforesaid, at St. Louis, Missouri, on November 9, 1938, there came before the Honorable George H. Moore, Judge of the United States District Court for hearing, petition of Trustee for determination of title and for advice and directions respecting certain proposed oil operations on right of way near Salem, Illinois, wherein the following proceedings were had:

APPEARANCES

Thomas T. Railey, Esq., and Russell L. Dearmont, Esq., for the Trustee.

Messrs. Craig and Craig, By Craig Van Meter, Esq., for Magnolia Petroleum Company.

Messrs. Craig and Craig, by Craig Van Meter, Esq., and G. E. McCullough, Esq., For the Ohio Oil Company.

STATEMENT BY COUNSEL FOR TRUSTEE

Mr. Railey: If it meets with the approval of the Court, I will make a very brief statement of the facts, and then have two witnesses to introduce.

This matter comes before the Court on a petition filed in behalf of Guy A. Thompson, Trustee of the Missouri-Illinois Railroad Company, Debtor, one of the subsidiary debtors in the Missouri Pacific Reorganization Proceedings.

The right-of way of the Missouri-Illinois Railroad in the County of Marion, Illinois, traverses one of the proven oil fields recently discovered, about four miles west of Salem, Illinois.

The particular petition concerns that part of the right of way over and across Section 20, in Salem Township, approximately a mile, in length. The petition of the Trustee asks that this Court determine certain claims to adverse title to the oil and mineral rights underlying this right of [fol. 120] way, which have been asserted by the three oil companies who have entered their appearances here today.

These are all of the known adverse claimants, although there may be other unknown adverse claimants who may assert some adverse claim to title.

The Trustee has accordingly asked this Court, in his motion, to issue an order of publication bringing in any of those adverse claimants who are unknown (it is unnecessary to bring in these three oil companies, whose appearances have now been entered) and asks that the Court hear evidence and determine these claims to adverse title. Since the printing of this publication will require some time, or may require some time and the oil under the right of way be dissipated and drawn into other wells pending this delay, the Trustee, following precedents often followed in these oil cases, has asked the Court to vest Mr. Thompson, as Trustee of the Missouri-Illinois Railroad, with the same authority that is usually vested in an independent receiver appointed pendente lite, that is, with the power to drill—to enter into a drilling contract, to conserve and sell the oil, and to hold the proceeds of the oil for the account of whom concerned, as determined by the subsequent order of this Court, paying out in oil, as far as possible, the reasonable expenses of drilling, conserving and selling the oil.

The petition of the Trustee sets forth the four deeds upon which this claim to this right of way is predicated. Of course, there is no question that it has claim for right of way purposes, by reason of adverse possession, but its claim to the fee simple title to the property is traced back to these three or four old conveyances, copied in full in the petition, which convey to the Railroad Company a strip of land for right of way sixty feet wide. That is the language in one of them, and they are all substantially to the same effect.

The question, therefore, is whether the conveyance of a strip of land for right of way sixty feet wide is a conveyance of a fee simple title of that land, the description of right of way being merely descriptive and for the purpose of locating the particular narrow strip of land, or whether

that is merely a conveyance of a right of way which would [fol. 121] be a mere easement for railroad purposes and, according to the claim of these adverse claimants, would not authorize the Trustee to drill and retain the oil underlying that property. That is the real question that is before this Court, and it may be necessary for the Court to make up his mind on that question in connection with this particular motion.

The particular proceeding now before you is summary in nature. The courts hold that you, as a bankruptcy court, can enter an order of this kind, with or without notice, on affidavits, on a sworn petition, or on such evidence as you may see fit.

F. E. Bates, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Trustee as follows:

Direct examination.

By Mr. Railey:

My name is F. E. Bates. I am Chief Engineer for Mr. Guy A. Thompson, in his capacity as Trustee of the Missouri Pacific and the Missouri-Illinois Railroad Companies. As Chief Engineer I have charge of matters relating to oil rights on the right of way of the Missouri Pacific and the Missouri-Illinois Railroads. I have made investigations and recommendations with respect to this particular right of way in Section 20, Salem Township, Marion County, Illinois. The field in the vicinity of the Railroad was developed, or the development was started early this year. The first wells were brought in several miles south, and development has progressed northward until it had reached the right of way in September of this year.

I have in my possession, as Chief Engineer, the original right of way deeds which are described in the petition, and those conveyances are correctly set forth in the petition.

Mr. Van Meter: We object to this line of testimony about these deeds for the reason that we contend that the deeds show on their faces that they only purport to convey an easement and not a fee simple title. We would like this objection to stand as to all such matters.

[fol. 122] The Court: Very well. It will be heard subject to your objection.

Mr. Van Meter: I am not objecting to Mr. Railey stating that the petition correctly sets forth the deeds. I am making the objection that the deeds set up in the petition only purport to convey an easement and not a fee.

The Court: It will be heard, subject to the objection.

Witness continues—

I have caused a survey to be made showing the oil wells now in course of operation, or in the course of drilling, in close proximity to the right of way of the Missouri-Illinois Railroad, in Section 20 referred to. The blue print Exhibit "B" which shows the right of way and the distance of the wells from the right of way is marked Exhibit "B" and offered in evidence, a copy of the said blue print being as follows:

(Here follows one photolithograph, side folio 123.)

H. T. Sweeney – Fee 59 Ac.

Harry F. Corbin – Lse.

B. F.

Ohio O

Nannie Wallis

250

255+19 - 18" C.I.P.

247+86 Public Xing

247+86.5

11 3/4"

236+66 - Whistle Post
236+19 - Xing Sign

235+39 - Public Xing

234+76 - 18" Corr. I. Pipe

233+31 - Fc

230

P.T. 227+24.6

D = 1°00
Δ = 3°0

23°54'

R.R. Prop. Fc - 32.5'

R.R. Property Fence 32.5'

65°06'

247+75 - Xing Sign.
247+68 - 12" Wt. Pipe.
247+38 - Whistle Post.

240

238+23

Rusler

N

e Wallis – Fee

Mrs. Matthew Young – Fee

Ohio Oil Co. – Lse.

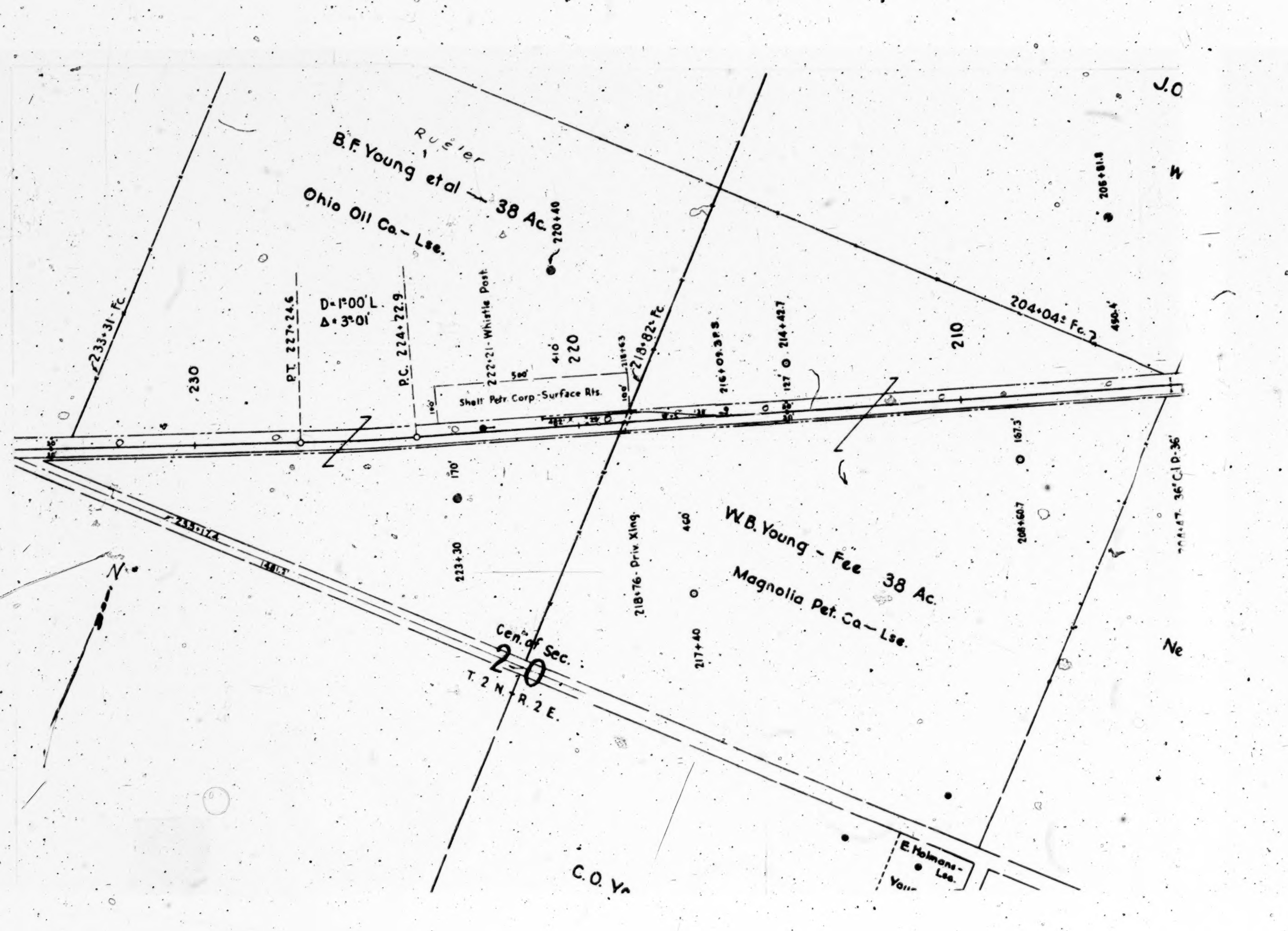
B.F. Young et al — 38 Ac.
Ohio Oil Co. - Lse.
Ruesler
D-1°00' L.
Δ-3°01'
P.T. 227+24.6
P.C. 224+22.9
233+31 Fc.
230
222+21 - Whistle Post
220+40
410'
220
218+82± Fc.
218+63
58'
100'
Shell Pet. Corp. - Surface Rts.
216+09.3±S.
214+42.7
127'
204+04± Fc.
210
206+81.8
490.4'
167.3'
170'
223+30
218+76 - Priv. Xing
460'
217+40
W.B. Young - Fee 38 Ac.
Magnolia Pet. Co. — Lse.
208+60.7
Cen. of Sec. 20
T. 2 N. - R. 2 E.
E. Holmans - Lse.
N
Ne
J.O
W

EXHIBIT B.

J.O. Shanafelt — Fee 78 Ac.

W.B. Bell — Lse.

T 2 N.

17 20 16 21

R 2 E.

204+47- Fc.

204+04± Fc.

210

200

190

205+81.8

199+99.4

191+10

193+84 Priv. Xing

193+36 R.Sw.

190+50 · Station Sign

189+79 End of Spur

662'

435'

450.4'

150.4'

127' @ 214+42.7

167.3'

208+60.7

204+47- 36' C.I.P.-S.

204+17 P.S.

205+65- Whistle Post.

193+89.4

194.6'

189+44.0

189+28

458.7'

187+97.7

185+34

63° 24'

R.R. Proper

L. Magnolia Petr. Co.

SELMAVILLE

Xing Sign

Young — Fee 38 Ac.

Magnolia Pet. Co — Lse.

E. Holmans — Lse.

Voir

Rusler.

Nellie Young Searle — Fee 40 Ac.

C.D. Ham — Lse.

D.W. Voi..

EXHIBIT B.

104A

T 2 N.

17 20 16 21

R 2 E.

1C.

193+84 Priv. Xing

193+36 R Sw.

191+10

435'

190+50 Station Sign

190

189+79 End of Spur

6812'

180

181+25 P.S.

R.R. Property Fc. 32'7

R.R. Pro

L. Magnolia Petr. Co.

63° 24'

193+89.4

186.6'

189+28

458.7'

185+34

184+42

Xing Sign - 18

187+97.7

Priv. Xing - 184

189'44.0"

SELMAVILLE

e, 40 Ac.

D.W. Yo.

123

[fols. 124-125] Examining Exhibit "B" the distance of each well in this particular section from the center of the Missouri-Illinois right of way is as follows: beginning at the east side of Section 20, the first well on the north side of the track is located 156.6 feet from the center line of the right of way; the second well adjacent to the track on the north side is 167.3 feet from the center of the right of way; the third well on the north side is 460 feet from the center line of the right of way. Beginning from the same side of the section the first well on the south side of the track is 435 feet from the center line of the right of way; the second well is 150.4 feet from the center line of the right of way; the third well is 450.4 feet from the center line of the track; the fifth well is 127 feet from the center line of the track; and the sixth well is 410 feet from the center line of the track. These distances are measured distances.

Mr. Railey: I desire to call attention of the Court to the manner in which this proposed contract with the Blackstock Oil Company is drawn. It is in three parts: The first part provides the manner in which he shall be paid pending this litigation, and is virtually on a cost-plus basis.

The second part embodies the lease provisions, which will be retroactive and supersede Part 1 in the event our title is upheld.

Part 3 is a provision agreeing to submit any controversy to this Court if our title is upheld in part and refuted in part.

Obviously, therefore, the gentlemen who are appearing here in behalf of these Oil Companies are not concerned with Part 2 or Part 3 of this contract, which have to do with the oil lease, because that will become effective only in the event our title is upheld. They are, however, somewhat concerned with Part 1, Article 1, of the Contract, which provides for the payment to be made to the Blackstock Oil Company pending this litigation, and which has to be paid out of the proceeds of the oil removed from their property.

I, therefore, think it advisable to have Mr. Bates explain to the Court in a little more detail the manner in which that cost is figured, and before doing so I ask leave to file with [fol. 126] the Court—and the Court's approval of—a slight amendment in the terms of the contract, that portion of the contract attached to the petition as Exhibit "A". These have resulted from some additional saving.

The changes that are proppsed are as follows:

In paragraph (o), Article I of the contract, the first item is "Cost of each well completed during such calendar month."

In this document on Page 8961 of the Printed Record purporting to be this contract, you will find the first item:

"(1) a. Price per foot depth of well $3.25

To make clear to all concerned what is included in that $3.25, I have in tlis amendment included some additional items in parentheses, so that it now reads as follows:

"a. Price per foot depth of well (including therein the following items: Service of geologist, Schlumberger survey, steel housing for well, changes in railroad facilities, casing fittings consisting of master valve, floatshoe, Hinderliter head, and surface rights on adjoining property) $3.25".

That was, of course, understood between the contracting parties, but it was not understood by some of the parties who examined the contract and felt that the $3.25 was somewhat excessive for the mere drilling and nothing else.

Item (1) f., that appears at the bottom of Page 8961, is "10 per cent for accounting and supervision."

Mr. Blackstock has agreed, at our insistence, to reduce that to "5 per cent for accounting and supervision.

On Page 8962, under Item (2) c, appears: -15¢ per barrel on all oil produced for all other operating costs of production."

That was intended to cover some speculative cost that Mr. Bates was anxious to have reduced to a definite figure, but, because of some criticism of that item by others concerned, Mr. Bates has deemed it advisable to put that back on a cost basis, even though it is somewhat more difficult to police the cost than if it were a definite figure. [fol. 127] Accordingly, "Operating cost of producing oil after drilling is completed," has been changed as follows:

Paragraph a. has been changed so as to provide $25.00 per month, as now set forth, for the first five wells, and it reduces that to $15.00 per month for the accounting expenses on subsequent wells, a saving of ten dollars per well per month for all wells over five.

Item b. has had the words added: "and all other materials and supplies for production and saving of oil."

There has been another item c., added as follows:

"All of the labor cost for production and saving of oil."

Then there is Item d.: "5% of items b and c for supervision."

In other words, that has been changed from a definite provision of 15¢ per barrel to a cost-plus basis to correspond with the other figures.

With respect [fo] subdivision (3) on Page 8962, relating to the cost of gathering and marketing of the oil, in line a., the actual cost, plus ten per cent., as it originally read, has not been changed to actual cost, plus five per cent., for supervision, as it were, and in item c., there has been added with 5 per cent thereon for supervision."

These are advantages to the trust estate and are likewise advantageous to anyone who is interested in the oil out of which these expenses are paid.

F. E. Bates recalled:

Mr. Railey's statement about the amendment to the contract attached to the petition is correct.

My experience as an engineer and my experience in handling oil matters for the Missouri Pacific has given me an opportunity to make a rather thorough investigation of this class of costs. I have made a thorough canvass of the situation. The cost of drilling wells, that is, the cost of drilling that drillers are charging in this field is from $2.75 to $3.50 a foot. Other items of probable expense are quoting the item shown in the amendment No. 1167, services of geologist are estimated at $100.00; Schlumberger [fol. 128] survey, at $125.00; housing for the well, requirements under the lease $225.00; changes in railroad facilities, $50.00; master valve, $185.00; floatshoe, $51.00; Hinderliter head, $125.00; surface rights on adjoining property $250.00, or a total of $5,850.00 for a well 1800 feet deep.

If the driller were obliged to absorb out of the $3.25 per foot on an 1800 foot well, all of those items, or possible items of the expense above named, that would leave $2.63 per foot for actual drilling.

With respect to the charge of 5% for accounting and supervision as opposed to 10%, that was a matter of negotiation between myself and Mr. Blackstock after can-

vassing the situation and after discussing it with other parties who are expert in these matters. That change was made because we felt that 5% was nearer a reasonable figure.

With respect to the 15-cent per barrel under the second subdivision, relating to cost of producing oil, we changed from 15-cents a barrel to a cost-plus basis for two reasons: Mr. Blackstock preferred such an arrangement on account of the uncertainty of marketing his oil; secondly, it would reduce that cost to actual cost rather than a unit cost that might be excessive, providing he could market the full production capacity of the well.

I consider these figures reasonable as finally agreed upon from the best information that I obtained from my conversations with experts and with persons who represent major oil companies.

Cross-examination.

By Mr. Van Meter:

I have had supervision of the matters on the Missouri Pacific since June. This information, as far as drilling cost, is based on bids furnished me by independent drilling contractors, in this particular field and in the Centralia field. In the Centralia field, the last wells drilled on our property were in September of this year.

Under Item a., of (1), drilling and equipment cost, it states that part of that cost is surface rights on adjoining property. Our right of way is of such width that an in- [fol. 129] dependent driller should, if possible, secure surface rights on adjoining property; it is a matter of economy. To my knowledge, we have not obtained surface rights. I do not know whether we can obtain them.

The item of 10%, in a., under (3), for the installation, maintenance, and operation facilities, has been reduced to 5% for accounting and supervision; that covers overhead of the contractor and general office expenses and any profit that he may make on this well.

There is an item c., under (3), actual cost of sales organization necessary to dispose of the oil up to a maximum of $500.00 per month. That is for disposing of the oil. The contractor is going to dispose of the oil.

Mr. Railey: That is a maximum limit but not fixed charge.

The Court: Actual cost up to the maximum; if it goes over $500.00, he gets no more?

Mr. Railey: Unless with our consent; the method of payment is set forth in the contract; at Page 8961 it reads as follows:

"For all operations, services, costs and expenses incurred or assumed by Contractor in or in connection with Contractor's performance of Contractor's undertakings as in this Article 1 expressed and set forth, during each calendar month."

Mr. Railey: A little further on, in relating to the obligations of the Trustee, it provides that it guarantees these payments under Part 1, but not under Part 2; that is, it is paid out of the oil in so far as possible, but if the oil is not sufficient to pay the costs under Part 1, the trust estate will have to bear the difference.

Mr. Van Meter: As I understand it, then, it all comes out of oil, all of these payments, except that part under Part 1, if the oil is not sufficient the Trustee pays it?

Mr. Railey: That is correct.

[fol. 130] Mr. Van Meter: But the whole theory is that all this cost comes out of the oil produced?

Mr. Railey: In so far as possible.

The Witness: There are approximately 8 acres of land in this right of way across section 20. It is proposed to drill 8 Benoist wells on that 8 acres, plus such additional wells to protect the property against offsets. There is a further provision that under certain circumstances, he is to drill 7 more Benoist wells, that would make 15 Benoist wells, and that is the maximum. The contractor is to drill to the McCloskey formation five wells for the development of the property. In addition to those 5 wells, there is a further provision in the contract that he is to drill 4 additional McCloskey wells if it is necessary to protect against offset wells. That would make a maximum of 24 wells on those 8 acres. I do not know that any of these present wells adjoining the right of way were drilled to the McCloskey at present. The McCloskey is at a depth of about 2,000 feet, the Benoist is about 1800 feet. The amount of oil that we will secure from the right of way is dependent to a certain extent on the amount of offsets on either side. We anticipate a recovery somewhere between three and

four hundred thousand barrels of oil from the 8 acres of right of way. The production per acre is estimated in that field at from ten to twelve thousand barrels to the acre. I couldn't tell whether to get three or four hundred thousand barrels, that oil would come out from adjoining premises other than the 8 acres of right of way.

The estimate that I gave with reference to oil to be recovered from the right of way is from the two sands; the estimate in the Benoist sand is ten or twelve thousand barrels per acre; it is rather skeptical what the recovery will be from the McCloskey per acre, there has been runs on it, but there has not been sufficient production to estimate. It couldn't be approximated.

We set up a certain figure here as to the cost that Mr. Blackstock is to be paid out of oil from these various wells. The actual cost of the well is approximately $12,200.00.

Q. Therefore, if you get a total of 300,000 barrels of oil, wouldn't practically all of that money be paid to Blackstock, under this contract, out of the oil?

[fol. 131] A. On the basis of eight wells?

Q. No, on the basis of twenty-four wells.

A. I don't know that we will drill the twenty-four wells.

The Contract says he must do that if I require it.

We are asking that this contract be approved at this time. He will drill 8 wells to the Benoist unless adjacent leases drill other wells offsetting our property. We have to protect ourselves against offsets, and we can require him to drill those additional 7 wells. If we have to be protected against offsets we can require him to drill up to nine McCloskey. It depends upon the recovery that we got. Whether if he drills 24 wells that would exhaust this oil money from all of the oil, the amount of oil is speculative that we will get out of these wells. If we drill 24 wells we would, undoubtedly, get more production than I figure. How much more, what I could give would simply be a guess. I couldn't very well tell you whether the production that we would get, that 300,000 barrels from the two sands that I say this 8 acres would produce, would come all from this 8 acres, or whether it would come from under adjoining lands along the right of way. There is a certain amount of drainage to each well, certainly.

The application here for approval of this contract is a matter of protection to the Trustee in this case against loss

of his oil that might be under this railroad right of way if he owns it.

We anticipate that the Trustee is going to drill 8 wells on 8 acres on this right of way to the Benoist sand; that is the calculated plan without reference to offsets. The recovery would be approximately ten or twelve thousand barrels per acre from the 8 acres. The drilling cost that the Trustee guarantees to pay in oil, if the production is sufficient, of 8 wells, would be in the neighborhood of $96,000.00. The posted price of oil produced in that field, the last I heard was $1.15. I think the production from the wells will exceed twelve thousand barrels. It is necessary for our production to be in excess of twelve thousand barrels per well, to make it profitable. If that is the production per acre, in order to make it profitable, then, if the recovery per acre from the railroad right of way is twelve thousand barrels, you must get oil from adjoining lands rather than [fol.132] from the railroad right of way. It is up to the owners of adjoining lands whether they protect themselves against drainage from land other than the right of way and drill offset wells.

The location of the wells to be drilled on the right of way has not been determined yet.

The twelve thousand dollars cost of completing a well covers a completed well with necessary facilities for the producing of oil. Necessary facilities would include your well proper, it would include housing for the well, it would include the preparation and installation of roads to get to and service the well, it would include the well head and fittings, flow tank, and oil and gas separator. The well would not be ready to produce without that equipment.

DORSEY HAGER, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Trustee as follows:

Direct Examination.

By Mr. Railey:

My name is Dorsey Hager. I am a consulting geologist, petroleum engineer. I am not employed in any other capacity by Mr. Thompson, as Trustee, for any of the Missouri

Pacific properties aside from my capactiy here today as an expert witness for the Trustee of the Missouri-Illinois Railroad Company. I am here solely as an expert to testify in this case.

I am the author of this work "Practical Oil Geology." I am the author of other works. I have had 28 years of experience in the oil business. I took my preliminary engineering work at Washington University, St. Louis, and at Columbia University, New York. From there, I went to California in 1910 and worked for the Southern Pacific, or the Oil Department of the Southern Pacific Oil Company, three years. I started in the field roughnecking, doing manual labor, and finally took charge of the property as its wells foreman. Later, I went into engineering, working for myself. I have been in that capacity almost continuously, with one exception when I managed a property for an Oil Company.

[fol. 133] I have prepared a contour map of the so-called Salem field, through which this right of way in Section 20 runs, and I have advised my clients about the purchasing of royalties and properties in and around the field; since the field has developed, I lived in Centralia, and have been associated with matters in that particular field; that was along in the spring of this year.

It depends upon the location of the wells in the field as to how deep it is necessary to drill to reach the first oil deposit in this field. There are two, and in some cases, three proven zones, or fields, also called horizons. Two of them are, the Benoist sandstone, and the McCloskey limestone. There is a structure or dome which you would term a common reservoir in this sandstone that I refer to as Benoist field, in which this deposit of oil is situated. The area outlines would run from six to eight thousand acres. The limits have not been clearly defined. The right of way of the Missouri-Illinois Railroad crosses that reservoir, or field, north of it.

I heard Mr. Bates' testimony regarding the proximity of oil wells now in operation in the vicinity of the Missouri-Illinois Railroad Company, in Section 20, and have examined Exhibit "B" setting forth those lines. In my opinion, those wells in that location will, in all probability, drain more or less of the oil from under the Missouri-Illinois right of way unless wells are sunk without delay on the right of way to conserve the oil thereunder. I would say there would be a material disadvantage if the wells are

drilled later. The pressure will be dissipated, and production of late wells would be far less than earlier wells. The experience of Mid-Continent, where wells are brought in without control the ultimate production of a well is generally placed from two and a half to three and a half times the first year's production. In other words, if they produce ten thousand barrels a year the first year, the ultimate production will be twenty-five thousand to thirty-five thousand barrels of the total ultimate production. That is all of the oil produced. In other words, you will produce anywhere from probably forty, and in some cases as high as fifty per cent of the oil the first year; other times, you will only produce one-third.

[fol. 134] In my opinion it is greatly to the advantage of this Trust Estate that wells be sunk as early as possible, while the pressure of the gas on the oil is there and before any of this oil is drained in large quantities to wells on adjacent properties.

From my experience, it has been that the first wells drilled get the oil and there must be channels formed, at least later wells drilled around them very seldom approximate the size of the first wells, if drilled considerably later.

Cross-examination:

I am familiar with the field and the wells that have been drilled. These immediate wells, I am not, except from the map. In driving through, I have seen the wells in Section 20, Township 2, that is all. I don't know all of the details of the initial production of those wells. I don't know how these wells are being produced, except the ordinary handling in the field. If the wells were on limited proration, if the wells were shut down, there would certainly be no drainage. If the wells were not limited proration, there would certainly be some drainage. It depends upon how long that continues. Some of these wells are 150 feet, or 125 feet away. We generally agree in the oil country, that wells that close will affect adjoining property. I don't know whether that 50 barrels a day, being the pipe line proration, that is 1500 barrels a month, which is a good deal of oil,—that oil will be draining from quite an area. It may come immediately under this property. We can't tell where it comes from. I don't know with 50 barrels a day limitation that there would be drainage of wells beyond the accepted prac-

tice in that field down there, 660 feet. If I owned adjoining property, as an independent operator, I would certainly immediately force, in 30 days time I would immediately force anyone that had my lease to pull an offset well to protect me. 10 acre spacing is the accepted practice in that field, that puts 660 feet between wells. That is the generally accepted practice in that field. Wells are not drilled there except where offsets are forced, at closer distances than that.

Q. In your opinion as a geologist, would you say that if those wells were limited production of not to exceed fifty [fol. 135] barrels a day, that wells that are farther away than 330 feet would have any likelihood of early drainage?

A. If the oil comes from the top of the sand, it depends on where the channels are formed, and how that oil comes in. That is a question I can't answer, I wouldn't take any chances in operating, if I were a landowner, I would not let anyone drill an offset well without forcing production.

It is general practice in the oil country to offset the same distance, that is if you put a well 330 feet from the line, the other man then generally places his well 330 feet. It is not established that where the 330 feet placing is used, that two wells placed 660 feet apart will drain all of th oil of wells in between. In some areas, the practice is one well in 5 acres, or one to 8, 5 to 40 acres. It depends upon the producing horizon and conditions. The accepted practice by all of the Companies operating in the Salem field, is on a 10 acre basis. If they could get it one to 20, they prefer 1 to 20.

As to the Salem field, as to whether the pressure that is furnished for the uplift of the oil is water, or gas, I am not familiar. We know the wells around the edge of the field have shown water and there is not a great deal of gas in any of the fields in western Illinois. So, I would assume there is a water drive. It is too early, probably, to establish a water drive. Any loss of gas or any pulling of oil from the top of the structure would allow the water to encroach on the sides, would allow the water to come from the sides and encroach or drive in on the wells. If you pull too fast, you would pull the oil out faster than the water pressure. The situation would be aided by the drilling of a large number of wells. The larger number of wells you drilled, the sooner that thing would happen.

Mr. Counsel, in any field we know from past experience, and that is all we have to go on, this is a new field, that where you have wells placed that close together there is drainage. You would have to have a gauge in the field to see what the effect is of one well on the other; you would have to have a gauge in pulling, and those measurements have not been made. I would say there would probably be a substantial drainage in six months. If they were held to 50 barrels, that would be 1500 a month. In six months, [fol. 136] that would be nine thousand (9,000) barrels. There would probably be some drainage that close. Some of those wells are 167 feet, one here is 127 feet and the other 154 feet. With the wells 330, or more, feet, I would say that the drainage would be far slower than those closer. There might be some drainage, that is something that I can't tell.

Mr. Railey: I believe that is all of the testimony we care to offer at this time, your Honor.

Mr. Van Meter: There are certain legal questions we wish to raise as to matters in the petition, but I assume your Honor wants us to raise them after the conclusion of the evidence.

And, Thereupon, the Defendants, to maintain the issues in their behalves, offered the following evidence:

C. J. Hares, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Defendants, as follows:

Direct examination.

By Mr. Van Meter:

My name is C. J. Hares. I live at Marshall, Illinois. I have been geologist for The Ohio Oil Company for twenty-one years. I have not acted as geologist for any other Company. My duties as geologist are varied; one of the main duties is that of acquisition of possible oil land. Also, the selection of drilling sites for wells. I have had practical experience along those lines during all of the time that I have been employed by this Company.

I am familiar with the premises described as the south-east quarter of the northwest quarter of section 20, and

the northwest quarter of the southwest quarter of the said section 20, in township 2 North, Range 2 East of the Third Principal Meridian, Marion County, Illinois. The Ohio Oil Company has oil and gas leases covering both of those tracts from the landower. Those oil and gas leases do not except the right of way of the Missouri-Illinois Railroad Company. I have been on those premises and examined the situation there with reference to the location of wells now existing on those premises. I was [fol. 137] there this past summer. I know the location of the wells there. I know where The Ohio wells are there located with reference to this right of way. One of them is in the neighborhood of 149 feet, and the other about 410 feet from the right of way according to the measurements. There are no other wells for The Ohio Oil Company less than 400 feet from the right of way.

I am reasonably familiar with the structure there, the sands that exist in that locality. The Ohio Oil Company is producing from the Benoist sand at this time. There is no production there by The Ohio Oil Company from any other sand. At the present time any drainage from under the right of way is inappreciable. Oil is being taken from these wells at the rate of 50 barrels a day. That is the pipe line proration,—50 barrels, per well, per day.

I am not in a position to testify as to whether The Ohio Oil Company has delivered any oil to the pipe line from the two wells hereinabove talked about.

It would take several months, if these wells were continued to operate as they are now, before there would be any drainage of oil from under the right of way to either of those wells. There would be no drainage in my opinion from the well that is 400 feet out from the right of way. As to the well that is about 149 feet from the right of way, the drainage would not occur from that well until several months from now.

The proration that I have testified about is based upon the Rules and Regulations of the Pipe Line.

I believe this field is a water-drive field. In that kind of field the drilling of 24 wells on an 8 acre strip is too many wells for the strip. The effect of that would be to take more oil out of those wells than they are entitled to. It possibly would shorten the life of the field, or the recovery of oil. It would tend to cause the water to encroach.

Basing my opinion on both the Benoist and McCloskey sands, the ultimate recovery per acre in this field would be about 10,000 barrels of oil per acre. In my opinion, the recovery from the Benoist would be in the neighborhood of 3,700 barrels, possible 4,000 barrels, per acre, and the [fol. 138] difference between that and 10,000 barrels would be the recovery per acre from the McCloskey. I am basing those estimates on a completed field nearby where this same sand is produced and the wells are being pulled out. This field is about 10 miles away. The field has produced in the neighborhood of 3750 barrels per acre out of this same sand. The field that I refer to is about 10 miles away, it is the Sandoval field. It has been in operation close to 30 years to recover 3,700 barrels per acre.

Cross-examination.

By Mr. Railey:

I do not know what the production in that field was during the first year. I do not know what proportion of the oil was taken out the first year with reference to this field that has been in operation for 30 years. I would not as an expert estimate that it was probably approximately one-third. It would roughly have been under the same conditions thirty years ago, as it is now.

In my opinion, a well in this Benoist sand in the field in question would drain only inappreciably, at least, at a distance of 410 feet. That would be true throughout the life time of the well. An oil company would not, under those circumstances, sink an offset of a well 410 feet distant. We are not sinking offsets if the well is less than 630 feet. The purpose of the 660 feet rule is so that there will be one well in all 10 acres. They are spacing wells at about a distance of about 660 feet throughout the basin, except where one of these little acre tracts is being drilled to force more wells. I also stated that at the present time I didn't believe that a well 149 feet from the right of way was drawing any appreciable amount of oil from the right of way. We know we have only taken just a little oil out of the well so far; nothing to mention coming from the right of way. One well has been only producing since October 30th, which makes about 50 barrels a day, and it has not been producing every one of those days. The same way with the second well.

That would be only about 450 barrels out of each well if it had produced every day the full amount.

I could not venture an opinion as to whether our Company would be willing to shut down and not operate any [fol. 139] wells within 500 feet of the right of way pending the determination of this title.

(After Noon Recess.)

I have no different answer than the one previous with reference to whether or not my Company would be willing to shut down any wells within 500 feet of the right of way pending the final determination of the title in this proceeding. I would not want to venture an opinion on that.

I refer[illegible] in my testimony to the Lake Centralia and Sandoval fields. The Lake Centralia field is the same as the Salem field. I did not refer to the Centralia Pool in my testimony this morning. I am not familiar with the Centralia Pool.

The Benoist sand in the Salem field is about 1800 feet. As to the thickness of the sand, it might be as much as 35 feet, probably including some shale with it. It might be at least 60 feet in some locations. I know the thickness of the Benoist sand in Section 20 where the wells that are fairly near the Missouri-Illinois right of way are located, in our Young Farm wells it is 35 feet, 28 feet, 40 feet and 36 feet. In our wells on these Young Farms it varies from 28 feet to 40 feet. By that I mean a 40 acre tract that my Company owns or leases through which this Missouri-Illinois right of way passes. That is the location I referred to. It is the Young Farms that the Railroad passes across. We have a minimum in the wells drilled of 28 feet to a maximum of 40 feet, that is the Benoist sand. We do not have any wells to the McCloskey in that territory.

I do not know in detail the thickness of the producing sand in the Sandoval district. It is, I presume, about the same being only 10 miles distant. I do not know for sure that the thickness is only from 15 to 25 feet, but since the two fields are so close together I would assume that the sands are about the same thickness. We know what it is per acre in the Sandoval field and that is a fair measuring stick for this one.

I do not have any knowledge at all of the production in the Centralia field. We have no leases as a Company in [fol. 140] the Centralia field. The Salem field is considered

one of the better fields that have been found in the State of Illinois. Perhaps the Beecher City Loudon field is in a class with this one. That is about 30 miles away. The Salem field is one of the best around the new pools, new fields.

If well informed oil men are estimating that there may likely be a production in the Salem field of from 40,000 to 50,000 barrels per acre, they are away too high. It is not my opinion that there will be that much. It might be true that many well informed oil specialists are making such estimates, but I am not advised on that subject.

If in this particular territory in Section 20 there was a well which had an initial production of 200 barrels of oil per day, if that well was 330 feet from our lines we would offset it. We try to use a little common sense with these locations, and make them fit a 10 acre pattern, that is best oil field practice. That is the pattern that it is laid out by, more or less. A 200 barrel well would offset oil territory as far as 400 feet away. We would probably offset a well of that size 400 feet away. It is correct that I think that would be good business judgment as an oil man.

The last time I saw the wells of my Company in Section 20 was in the neighborhood of 10 days ago. From the Company records, I know the amount has been 50 barrels of oil per day taken out of each of the wells of my Company in Section 20; one well has been in 5 days, and has made 450 barrels, and the other had made 100, according to our records. That is control production. The initial production on one of them was 135 barrels without control, so that would be about the maximum that we would expect to get if you produced your capacity. A 135 barrel well is a nice little well. In my opinion it would draw oil at least from 330 feet. Most of the oil would first come from right around the well itself. It would draw a few gallons of oil as far as 330 feet. If it did draw a few barrels, that is merely negligible. We might be forced by the land owner to drill an offset. We found it necessary to offset commercial wells and if my client owned lands within 400 feet, I believe, if [fol. 141] there was a well producing approximately 200 barrels per day, I would advise sinking an offset well to conserve his oil. We don't do that for the fun of drilling a well. We feel that there is better territory back a way from that distance, and if we do not offset the well that is drilled, we may have the lease cancelled. If I owned the

property myself in my own right, I would probably drill the well.

The Court: Why would you do that if it would not drain more than a few gallons, or a few barrels?

The Witness: It takes a long time; it takes these wells in the neighborhood of 20 to 30 years to get all of this oil. You can not get it all in one day or one month or one year.

As a guess, the approximate amount of oil that would be taken of a well the first year, as compared to its total production, might be at least one-third. As to these two wells near the right of way and on The Ohio Oil Company's leases, we had one of them to go on one day 135 barrels, that was 24 hour production. Since then they have been prorated. That is the south one. There is no reason to think that the north one is any larger, that was the well nearest to the right of way. The south well is nearest.

Redirect examination.

By Mr. Van Meter:

If a well is drilled on that right of way, this 60 foot strip, that would require in the way of offsets on adjoining premises the drilling of two wells, one on either side of the railroad, both the north and south sides.

Recross-examination.

By Mr. Bailey:

Ordinarily they offset them right up to the line, using 30 foot for the person that drills on the right of way, because they have to stay away from the ties: that leaves them about 20 feet, so, his hole is going to be in the neighborhood of 10 feet from our line, and that is where our hole would be, also.

[fol. 142] D. V. Carter, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Defendants, as follows:

Direct examination.

By Mr. Van Meter:

My name is D. V. Carter. I live in Dallas, Texas, have lived there approximately 5 years; I am Chief Petroleum

Engineer of the Magnolia Petroleum Company. I make frequent trips regarding producing, technique, equipment and so forth, in various states where our properties are located, including Illinois. Our Company has about 7500 producing wells. I have had experience with those various oil wells. I have been a Petroleum Engineer for approximately 13 years.

The Magnolia Petroleum Company has an Oil and Gas Lease from the landowners covering the southwest quarter of the northeast quarter of section 20, township 2 north, range 2 east of the Third Principal Meridian.

Mr. Bailey: May it please the Court, for the purpose of this summary proceeding, it is agreeable that these gentlemen may offer their title in this manner.

Mr. Van Meter: I have certified copies of the lease, but I understood Mr. Bailey that it was all right in this preliminary proceeding, to make the proof in this manner. If there is any question, I can offer these certified copies.

Mr. Bailey: That is all right. It is satisfactory also to make the proof as to the leases of the Ohio Oil Company by the parol testimony, as has been done heretofore. There are two Leases covering The Ohio Oil Company property involved in Section 20.

The Witness: I have been down on this property described as the southwest quarter of the northeast quarter of section 20. I was down there yesterday afternoon about three o'clock. I had been in the field before. I had not been on that particular Lease before, because the first well is only three or four weeks old. I have been in the Salem field before. I have information of the surface condition, and general characteristics of the sand in the field, so far as we have been able to determine it up to this time. [fol. 143] We have two wells in the extreme close proximity of the railroad right of way, that is within several hundred feet, we have 2 wells, number 5 and 6. Number 6, W. B. Young, is north of the railroad. Number 5, W. B. Young, is south of the railroad. Our Number 6 well, according to the Missouri Pacific map, is 127 feet north of the center of the right of way. The Magnolia Company's Number 5 Well is 167.3 feet perpendicular line in a southerly direction from the center of the right of way. On this 40 acres we have producing wells No. 2, No. 3 and No. 1. No. 2 Well is regular location as I recall, 330 feet, or 533

feet from the right of way. The other two wells are a greater distance from the right of way; I would say in excess of 700 feet. Wells Numbers 5 and 6 are possibly not over two weeks old. They are at present connected with the pipe line. I understand that they are on pipe line proration of 50 barrels a day. At the present time, in my opinion, from these Wells Numbers 5 and 6 there is very little draining affecting the Missouri Pacific right of way. The basis of my opinion is, looking at the entire Salem field as being a common reservoir and in a given horizon with particular reference to the Benoist sand, the source of energy is the water-drive in the Benoist sand and any Lease favorably situated on structure, that is for example in Section 20, whether it is in Ohio, Magnolia, or Missouri Pacific right of way, a barrel of oil drawn at a low rate of flow, but under reasonable proration is, for the most part, particularly in the early stages, replaced from the oil that is driven into it, due to this water-drive. In time, as the production of the wells declines, the daily production, in years to come, there would be drainage on the Missouri Pacific right of way. The time that drainage will occur in appreciable quantities will depend upon the density, well acre density, the field is drilled to. If the field was uniformly laid out, with no small tracts, and was drilled one well to 10 acres, and reasonable proration was used in order to conserve the water energy and not create prematurely a low pressure area, then the oil would be driven up the depth from the edge of the field, subsurfacely speaking, toward the center of the field. The effect upon the field of too much drilling, like 24 wells to an 8 acre strip, it is too many wells. It depends upon the character of operator. You can't always make a blanket statement; [fol. 144] that, more or less, is always bad practice from the standpoint of drilling into water, because, if extreme care was used and the physical characteristic of the sand was such that we had an easy field to operate, there would be little chance of waste, but there is a tendency in the case of a field, like the Salem field, where there is no proration, other than pipe line, and more than one sales outlet or crude oil producing agent, one Company ships a tank car and then two or three pipe line companies producing, a man that had an independent outlet could produce three times the amount of oil per day. We will say, the wells produced three times more than the offset connected to

the pipe line, then the well producing the most oil, and at an excessive rate, more than the well could properly stand, will result in water coning—water coning is premature water encroachment, and that is controlled by two principal factors, the depth of the amount of penetration of wells drilled, and, second, the rate of flow. In other words, if you open it to the entire capacity of the well. Premature water coning, that is an attempt to get all the oil as quick as you can, is usually what results in blocking off; in other words, the water cuts off the oil, or the gas slips off the oil. There would be a combination, in this case, without recovering its just amount of oil or its proper share of oil.

For each well drilled on the right of way of the Missouri Pacific, that would require one well north of the right of way and one well south of the right of way, which would be classed as direct offsets, and they would be drilled in equal distance from the property line.

It is not difficult if the usual precautions in drilling are exercised by the Contractor, or the man in charge, to keep the well on a particular strip at the bottom of the well. It is the tendency of all wells, particularly rotary drilled holes, to slope slightly. The deeper the well, the more power is given to that slope. Wells in the Gulf Coast are drilled ten or twelve thousand feet deep. Certain Companies require a limit of five degrees off vertical. Those are deeper wells. Certain Companies require as low as three degrees as a maximum of departure from vertical. Drilling within 30 feet of a property line, I have just forgotten the exact figures, but I believe you have to hold it [fol. 145] down to one degree or it might be two, or you would get off of the 30 foot strip at the bottom of the hole.

There are two sands that are capable of producing, and a recognized possibility of a third,—they are the Benoist, Aux Vaux and the McCloskey.

I would rather express an opinion as to the average recovery, not from the standpoint of barrels per acre, but from the standpoint of acre feet. I think, offhand, without going into a lot of detailed calculation, 200 barrels per acre foot of the Benoist sand would be a reasonable assumption at the present time. That means that if you have a thickness of ten feet of sand you could recover 2000 barrels of oil. If you have 40 feet of sand, that would be 8,000 barrels. I would like to check that on the chart here

a little bit closer. It would take a little bit higher than 200, I would say that would be in the neighborhood of 225 barrels per acre foot. Yes, that is assuming 90% saturation, 40% recovery, and not allowing them any shrinkage factor. 40% recovery of all oil in place would be commercial recovery, that is, would be extracted and sold. That is an assumption. If the water-drive has a high efficiency, it might be as high as 70%, and we could raise it accordingly. If the fields are not subject to a natural drive or in the late stages of life, an artificial life created by further drilling and water flooding, the recovery may run 20%. In this case, without making any laboratory tests, I don't believe there is any great amount of free gas. It is probably all in solution, just like carbonic acid acts in solution in Coca-Cola.

In my opinion, at the present time there is no appreciable amount of drainage from these two wells under the restriction of 50 barrels per well. It would become more appreciable at the time the wells have no potential above their daily allowable. Now, some of those wells can produce three to five hundred barrels per day, and they are taking 50 barrels, and when they reach the time when they can't make over 50 barrels per day throughout 24 hours, then drainage becomes increasingly important.

[fol. 146] Cross-examination.

By Mr. Dearmont:

The initial production of our No. 6 Well was flowing 360 barrels in 24 hours; No. 5 well flowed 288 barrels the first day; No. 2 well 300 barrels the first 24 hours; all of these wells are Benoist sand wells; No. 1 averaged about 20 barrels per hour on the 24 hour test; No. 3 was 336 barrels for the 24 hours. These are all Benoist sand wells. We have not, to my knowledge, hit any water in the lower part of this Benoist sand in drilling the Wells Numbers 2, 5, and 6.

It is my opinion that the closure on the structure is in the neighborhood of 180 feet, and, for the sake of argument and illustration, I will say the Benoist is 40 feet, and the area where Section 20 is located, as regards structure, I don't suppose there would be any water in Benoist in that immediate area; however, on the edge of the field, the rate of withdrawal affects whether or not there is

water encroachment. There is not a lag, the water encroachment keeping up with the oil withdrawal.

The west one-half of the east one-half, section 20, is, you might say, quite desirable from a structure standpoint. Although you would have water encroachment there, it would not be so serious at the present time; the high rate of withdrawal due to an excessive number of wells drilled would have the effect of premature low pressure area being created. From the coning standpoint, right there, I couldn't say there would be an immediate danger of it. I know in East Texas a field of 130,000 acres approximately now has approximately 26,000 producing wells. Due to the nature of the land tracts, size, and shape, and due to the fact that it was before we had available proration laws and orders in the State of Texas, take the New London Townsite, in the middle of a field, where they have drilled an excessive number of wells, there is a tendency for that to occur. Just like a cancer, it continues to grow out and affect of that may be felt a half mile away. In Illinois there is no conservation law, and once you break that, there is a tendency for each operator to maintain an equal well acre densite for each tract.

I know Mr. Blackstock. Our Company had partnership property with him, and I believe I have met him. However, [fol. 147] I can't say I am a close friend. I think Mr. Blackstock is recognized as a drilling contractor,—as an oil operator, I couldn't say one way or the other; not to be prejudiced in this case, but I just lack knowledge; he is a drilling contractor, yes. I believe in the past he has drilled for our Company.

Our No. 6 Well is located within 127 feet of the center line of the railroad right of way, according to the Missouri Pacific map, that would mean that that Well is located 97 feet from the right of way line. That well had an actual production of 360 barrels a day. It is my opinion, that a well of that capacity, and located within 97 feet of the line of the railroad right of way, would drain no appreciable amount of oil from the right of way property at present, that is for several months, but, as time went on, in the later stages, maybe a year, two, or three years, it depends on what rate withdrawal is taken from the entire reservoir, there would be such drainage. There is no mandatory limitation on the amount of oil you can take. There

is an outlet limit by pipe line. [It] order to make an accurate estimate as to how much the drainage would be, you would have to give me the rate of withdrawal, and you would have to show me the locations of all offset wells to the strip and give me the time factor, and we would have to study the pressure decline in the reservoir by the use of an instrument.

Q. I can give you this, I can give you the fact that your well is located within 97 feet of our right of way. At the present time, after that well No. 6 has been going two weeks, or less, I will ask if it is not a fact that located 97 feet from that right of way which has no wells on it now, there is an actual drainage of oil, to some degree, from that right of way by that well?

A. It would be very, very negligible, in fact, we are forced to wait for lack of drilling tools, in a great many cases, for a longer time than that.

In answering that question, I am not taking into consideration the fact that the wells only flowed for about 10 or 12 days, but am considering fields where wells flowed 5, or 4, or 8 years. If it were located within 50 feet of the right of way there would still be negligible damage done [fol. 148] on account of the oil withdrawn from our producing well No. 6 being replenished both on the strip and our own lease from the whole field around it to a great extent, oil from the outermost portion of the field. If there was a well within 25 feet, the closer you get, it becomes increasingly more damage, whatever that damage is. I don't feel that a well within 50 feet of your right of way would drain any material amount in a short period; [or] course, the right of way would be affected.

Assuming we drill 5 wells initially on one mile of right of way, 5 wells on 8 acres, that would give you 1.37 acres per well, and we will assume that you take 50 barrels of oil per day. You would be getting at the rate of 30 some odd barrels per day per acre. I will assume that we offset. Of course, our tracts are larger; we have less density. We will assume that we drop our density from 10 acres to 5 acres. We would obtain 10 barrels per acre per day, and you would be getting 37 or 38 barrels per acre per day. Of course, beyond that, it is a legal matter. In other words, you would be drawing substantially three, or it may be four times as much per acre as we would, under

the facts that I base my answer upon. There would be appreciable drainage over a number of years. It is a matter of arithmetic. In a ten year producing life, it would be a great inequity.

With reference to the drainage in six months, we will say 32 barrels per acre, per day, 8 times 32 is 225 barrels per acre, per day. We will say that is, roughly, 7,000 a month; six months would be 42,000 barrels in six months. That would be the difference. In a year 84,000 barrels. It would be as much oil as some appraisal engineers would give for the property originally.

Q. Would not be possible to get that much when you say there will be only a production of about 8,000 barrels per well in that field?

A. I didn't quite get your question.

Q. I understood you to say that there would only be produced something like 8,000 barrels of oil per well, throughout the life of that field.

A. No, I did not make that statement. I was talking about acre yield. I left the question open as to the net [fol. 149] thickness of sand. I corrected myself in 200 barrels per acre foot to 275, and then corrected that shrinkage factor, subtracted 17½ barrels, which would give you around 260 per acre foot of Benoist, based on laboratory test core analysis from one well only. That was taken from the State of Illinois. That is as far as I can go. We are in process of doing other analytical work.

J. F. Reglin, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Defendants, as follows:

My name is J. F. Reglin, I live in Bridgeport, Illinois. I am Division superintendent for The Ohio Oil Company. I am familiar with the Salem field, and with the wells and properties involved in this proceeding. I am familiar with the drilling costs and the costs of operating and producing wells in that locality. I have examined the drilling and equipment cost which are made a part of the petition in this case. I have examined the amendment here that was filed this morning.

I have arrived at certain figures as to the fair and reasonable cost of drilling wells such as those that are set forth in the Schedule. The cost of the well is $9,205.13. That includes everything, except pumping unit, and the necessary connections there to connect the pumping unit. The details of that are as follows: the cost of drilling, I figured, this is an 1800 foot well, $2.75 per foot, $4,950.00; connections for the flowing well would cost $250.26; total cost per well would be $9,205.13.

Cross-examination.

By Mr. Railey:

I have not made any allowance for geologist services. I have made no allowance for Schlumberger survey. It is up to the Railroad Company whether they want to use it or not, if they want to spend that money. We don't think it is necessary. I wouldn't say that you would be safe in drilling these wells without the services of a geologist. I would do it for myself. I have not included the cost of steel housing. We don't use housing, just have it out in the open. I wouldn't think there would be any more danger [fol. 150] along the right of way than there would be away from the railroad. I have not simply figured the cost out on the open field; we have operated these wells up against barns and houses, and we don't think there is any danger. I haven't included an item for railroad facilities or tank car connections. We don't use a master valve. We use a control head. I have used a float shoe. We use a National type head, rather than a Hinderliter head. I haven't figured any allowance for possible rental of adjoining property for road purposes, or any purpose of that kind, if it could be obtained.

The profit the man who drills the well would obtain, would be in the price per foot. We pay the contractor $2.75 per foot and when he drills the well he is through, that is only for drilling the well. That does not include any of the things that go into the well, such as pipe, he furnishes nothing except the drilling tools and the oil, fuel, and everything that it takes to drill the well. We allow no profit on anything except the digging of the hole in the ground. I would say $2.75 is the average cost of drilling in that field at present, but there are Companies

that are drilling with their own tools that drill much cheaper than $2.75. I know where they have been drilled on a right of way, the contract price was just the same as the other drilling. We didn't make any distinction. I know where they were drilled in Illinois on the Electric Light at Dupo. They charged around $4.00 per foot, that was cable tool drilling, that was the general price all over the field. That is the only place I know they were drilled. We allow our own company tools $1.75 a foot.

The drilling contract that we have is at the price of $2.75 per foot. This contractor has drilled two, another contractor has his sixth well, and another contractor was on the second well. Just one well is called for in their respective contracts, any place one well. We never let any contracts except for one well. The only instance that I know of well being drilled on the right of way, was where they charged $4.00; and we drilled the same well for $1.75 up against the right of way. We allowed $100.00 per well for roads.

[fol. 151] I just glanced at this amendment of the petition. I heard the testimony this morning of the amount apportioned to each of these items. I wouldn't say that $100.00 for service of geologist was reasonable, or not. A price of $125.00 for Schlumberger survey, per well, is reasonable, but I think it is up to the operator whether he thinks he needs it or not. I have not included it in my calculations because we don't think it is necessary. I have allowed nothing for steel housing for well. The railroad could build any housing they want for it, as elaborate as they wanted it. I think that it is unnecessary. Whether $225.00 was a reasonable price would depend upon the size of the building that they built. It would not need to be that large a building that would cost $225.00. I think a 50 foot building would be plenty large enough. So there is something to protect your belt is all you need. I have not taken into consideration housing there that will protect the well from sparks of engines as they go by, and protect it from the ordinary hazards of the Railroad. I wouldn't think there was danger of that kind along the railroad. I have not given consideration to any switch tracks or railroad facilities or anything of that kind. $185.00 is too much for a master valve. We use a controlhead. If the Chief Engineer of the Missouri Pacific thought that was reasonably desirable, I wouldn't question

the price of it, except it is taken off when the well is completed, so that it could be used from one well to another. You couldn't do that if you were drilling four wells at once. We substitute for that, a control valve. We bought this one for $50.00. If your tools are running at the same time on four wells, I think you would need one for each well.

The calculation of $51.00 this morning for a float-shoe is too high. We use guide shoes, which cost $22.52, and then we use a float collar on top of the joint, which costs $39.43; if $51.00 includes both of them, it would be reasonable.

We use National Supply head instead of Hinderliter head, we pay $61.00 for it, in place of Hinderliter. It answers the same purpose. Hinderliter head is more expensive, and not necessary with low pressure wells. Hinderliter is what they usually use for a high pressure well. If the Hinderliter is used, $125.00 is the usual price for it.

[fol. 152] I think $250.00 per acre for surface rights where wells are built along a narrow strip of this kind is unreasonable, because I have just made arrangements to rent surface rights for $25.00 per acre, 2 acres of surface rights. My Company does not have any surface rights. We have a lease on the land. I wouldn't say whether we have a lease on the surface rights. I would have to take it up with the management whether we will be willing to make you a lease for the surface rights, if we have them. In other words, my statement does not mean much, but I know what I can rent the surface for down there.

Q. In the calculation this morning, it was stated that an 1800-foot well at $3.25 would cost $5,850.00 for the drilling; there was included in that these various items which I have listed, thereby leaving to the driller for his service in drilling, only $2.63 as against the $2.75 that you are figuring in your calculation. Did you know that?

A. You are figuring different than I am. You are figuring on the driller furnishing a lot of extra things, that our driller does not furnish.

My figure of the cost of the well is figured on an entirely different basis than the Railroad's estimate, because I haven't included many of the items that you have included. I wouldn't think that they would be included in the cost of a well. The payment of the geologist and these other expenses are overhead, and I have nothing to do with the

overhead. I have not included those in my figures, either directly or indirectly,

I have not allowed Mr. Blackstock, the driller, any profits at all for his operation in the event the railroad's title should be defective, except what little profit he might have out of the actual drilling of the hole, $2.63 per foot. I have allowed $2.75 a foot as against the Railroad's $2.63 a foot. I figured a 7 inch casing, weight 17 pounds. I didn't see this item of cost attached to the petition and in the amendment—what size and weight of casing was figured. The casing that I use is seamless. I would say that adjustable chokes are necessary,—especially when you have to shut it down.

[fol. 153] Mr. Van Meter: Mr. Railey, in regard to The Ohio Oil Company, I have abstracts here of your right of way. There was a question where a man died leaving Caroline Rusler, a widow, and no children, and she inherited one-half (½) of the fee. Your right of way deed came from her on two of these tracts involved in The Ohio Oil Company's Lease. Are you willing to agree as to that, or not, that is you didn't have a right of way deed for a full interest as to those two tracts?

Mr. Railey: With this qualification, your Honor: There is some defect in the title to the Caroline Rusler land, the question being as to whether the deed on which we are relying conveyed more to us than a half interest. The grantor only had a half interest, but that grantor, assuming to have the entire interest, conveyed what purported to be the entire interest to us, and we have had actual, open, notorious possession of that property, under fence, for more than twenty years. So, if it be true that that deed, according to the wording is a warranty deed and it conveyed to us a fee simple interest that she owned, then it has been cured by the Statute of Limitations. So, we do not admit that we do not have the title to this property in its entirety, if it be assumed that the deed on its face purported to convey a fee simple title, as distinguished from an easement. So, we therefore get back to the ultimate question, namely, whether these deeds which purport to convey a strip of land for railroad right of way sixty feet wide, convey a mere easement or a fee simple title. If they convey a fee simple title, any defect that counsel refers to has been cured.

The Court: By the Statute of Limitations?

Mr. Railey: Yes.

Mr. Van Meter: That is a question we want to argue before your Honor.

I understand you agree that this woman only had a half interest at the time she made the right of way deed——

Mr. Railey: Provided you likewise agree that we have had an open, notorious possession under fence since that time.

[fol. 154] Mr. Van Meter: I will agree that the Railroad has been on there, under fence, for over twenty years, and you agree for the Trustee that Caroline Rusler only had a half interest at the time she made the right of way deed.

Mr. Railey: That is all right.

Mr. Railey: For the purpose of this appeal, the debtor-trustee does not question that The Ohio Oil Company and the Magnolia Petroleum Company have sufficient interest in the subject matter of this litigation to constitute them proper parties to appeal, and raises no question because of the failure of the Kingwood Oil Company to join in this appeal.

Mr. Van Meter: It is further agreed that the Missouri and Illinois Railroad Company is a subsidiary debtor in the Missouri Pacific Railroad Company reorganization proceedings, and that Guy A. Thompson is the duly appointed, qualified and acting Trustee thereof.

The above and foregoing was all of the evidence offered upon the hearing.

Approval of Narrative of Testimony by Counsel

The foregoing narrative of the testimony adduced at the hearing in the above entitled cause which is to be used on the appeals of the Magnolia Petroleum Company and The Ohio Oil Company in said cause to the United States Circuit Court of Appeals for the Eighth Circuit and the Stipulations therein contained are on this 14th day of January, 1939 approved and designated to be a part of the record on said appeals by counsel for the parties.

Russell L. Dearmont, Thos. T. Railey, Counsel for Guy A. Thompson, Trustee. Craig & Craig, by Craig Van Meter. Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Counsel for Magnolia [fol. 155] Petroleum Company. Craig & Craig, by Craig Van Meter. Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Counsel for The Ohio Oil Company.

In United States District Court

Stipulation of the Parties Designating Parts of the Record, Proceedings and Evidence To Be Included in the Record On Appeal—Filed January 14, 1939

It Is Hereby Stipulated and Agreed by and between Russell Dearmont and Thomas T. Railey, Attorneys for Guy A. Thompson, Trustee of the Missouri-Illinois Railroad Company, Debtor, one of the subsidiary Debtors in the Missouri Pacific Reorganization Proceedings, the Petitioner in the above entitled Petition, and Cobbs, Logan, Roos & Armstrong, and Craig & Craig, Attorneys for the Magnolia Petroleum Company, a Corporation, and also Attorneys for The Ohio Oil Company, a Corporation:

That this said Stipulation shall serve to designate the parts of the record, Proceedings and Evidence to be included in the Record on Appeal to be filed with the Clerk of the Circuit Court of Appeals for the Eighth Circuit with reference to the consolidated appeals of the Magnolia Petroleum Company, a Corporation, and The Ohio Oil Company, a Corporation, the said two Companies having appealed from the Interlocutory Judgment and Order entered by the District Court in and for the Eastern Division of the Eastern Judicial District of Missouri, in this matter, on the 14th day of November, A. D., 1938, the said Magnolia Petroleum Company, a Corporation, having appealed by Notice of Appeal under the Rules of Civil Procedure for District Courts, and also having appealed by Petition for Leave to Appeal and Assignment of Errors attached thereto, which said Petition for Leave to Appeal was allowed by the said District Court, and the said Defendant, The Ohio Oil Company, having also appealed by Notice of Appeal under the Rules [fol. 156] of Civil Procedure for District Courts, and also having appealed by Petition for Leave to Appeal and Assignment of Errors attached thereto, which said Petition for Leave to appeal was allowed by the said District Court, and both of said Defendants having filed two (2) Appeal Bonds in the sum of Two Hundred Fifty Dollars ($250.00) each in both of said appeals on the 12th day of December, A. D., 1938, all of said Appeal Bonds having been approved by the Honorable George H. Moore, Judge of the District Court of the United States aforesaid on the 12th day of December, A. D., 1938.

This said Petition No. 1167 having been filed in the Proceedings with reference to the Reorganization of a Railroad Number 6935 in the District Court of the United States aforesaid, it being hereby agreed by all of the parties hereto, there being only one judgment in this said Proceedings, that the said four (4) Appeals hereinabove described may be consolidated and heard in the Circuit Court of Appeals For the Eighth Circuit on one (1) Record, and that only one (1) Record shall be filed with reference to the said four (4) Appeals in the said Proceedings, and also only one (1) Record and one (1) set of Briefs be printed with reference to the said four (4) Appeals so to be consolidated with the approval of the Circuit Court of Appeals of the Eighth Circuit of the United States of America; and it is further agreed that the parties hereby designate and agree that the said Record shall contain the following as the Record on Appeal:

(1). Placita, on Convening Order.

(2). The material pleadings in this said Proceedings, including the Petition of the Trustee for determination of title and for advice and directions respecting certain proposed oil operations on right of way near Salem, Illinois, being Petition No. 1167, which said Petition was filed in this Proceedings on the 1st day of November, A. D., 1938; the Amendment to said Petition filed on the 9th day of November, A. D. 1938; also including the Answers and Amended Answers of The Ohio Oil Company, a Corporation, and Magnolia Petroleum Company, a Corporation, filed in the said proceedings, said Answers being filed on the 9th day of [fol. 157] November, A. D., 1938, and said Amended Answers being filed on the 28th day of November, A. D., 1938.

(3). The Judgment of the Court on the said hearing.

(4). Narrative of the Testimony on the said hearing.

(5). All papers filed to perfect the said consolidated appeal, including notices of appeal and petitions for leave to appeal filed by both of the said Defendants, also the four (4) Appeal Bonds, two (2) of which were filed by each of the respective Defendants.

(6). All Assignments of Errors filed by each of the said Defendants.

(7). All Statements of Points to be Relied Upon upon appeal filed by each of the Defendants.

It Is Further Stipulated and Agreed By and Between the Parties Hereto that in said Brief on this consolidated appeal either of the Defendants may raise any question that they may contend is presented by the evidence or pleadings with reference to that particular Defendant whether that particular question applies to the other Defendant or not.

It Is Further Stipulated and Agreed By and Between the Parties Hereto that it is not necessary for the Defendants to file a designation of the part of the Record to be used as the Record on appeal, and It Is Further Stipulated and Agreed By and Between the Parties Hereto as above set forth that one record shall be filed covering each and all of the four (4) consolidated appeals.

Dated this 14th day of January, A. D., 1939.

Russell E. Dearmont, Thos. T. Railey, Attorneys for the Trustees. Cobbs, Logan, Roos & Armstrong, [fol. 158] by Thos. H. Cobbs, and Craig & Craig, by Craig Van Meter, Attorneys for the Defendants, Magnolia Petroleum Company, a Corporation, and The Ohio Oil Company, a Corporation.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 159-164] Appearances of counsel omitted in printing.

[fol. 165] In United States Circuit Court of Appeals, Eighth Circuit

Nos. 11,410, 11,411

Magnolia Petroleum Company, Appellant,

vs.

Guy A. Thompson, Appellee

Nos. 11,412, 11,413

The Ohio Oil Company, Appellant,

vs.

Guy A. Thompson, Appellee

Stipulation of Admitted Facts, Etc.—Filed May 2, 1939

It is hereby stipulated that in the presentation of the above cases the Court may accept as admitted by all parties

in interest the following facts, if the Court rules they are material; the Appellants, however, hereby object to the competency, relevancy and materiality of these facts, said facts being as follows, to-wit:

That with respect to the strip of ground for right of way [fol. 166] sixty (60) feet wide conveyed by Caroline Rusler to Centralia & Chester Railroad Company over and across the tract of land described in the warranty deed dated January 3, 1898, and recorded January 25, 1898, at Page 577 in Volume 56 of the Records of Deeds, Marion County, Illinois, Guy A. Thompson, Trustee, Missouri Illinois Railroad Company, Debtor, and his predecessors in interest have currently for more than twenty (20) years prior to the institution of these proceedings paid all taxes legally assessed or assessable thereon in pursuance to Sections 46-47, Chapter 120, Illinois Revised Statutes, 1935, which said strip was assessed and the taxes paid thereon as "Railroad tract" irrespective of the Estate owned therein by the said Trustee and his predecessors in title, along with and in the same manner as all right of way lands of said Company in said County, as required by Statute, without specifically describing said right of way tract or the estate owned therein.

Thos. H. Cobbs, Craig Van Meter, Wm. H. Armstrong, Attorneys for Appellants. Russell L. Dearmont, Thomas T. Railey, Attorneys for Appellee.

Dated April 26th, 1939.

[File endorsement omitted.]

[fol. 167] In United States Circuit Court of Appeals

Order of Submission in Causes Nos. 11410, 11411, 11412 and 11413—May 11, 1939

These causes having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. Thomas H. Cobbs for appellants, continued by Mr. Thomas T. Railey for appellee and concluded by Mr. Craig Van Meter for appellants.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 168] IN UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 11,410 and 11,411—May Term, A. D. 1939

MAGNOLIA PETROLEUM COMPANY, Appellant,

vs.

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor, Appellee

Appeals from the District Court of the United States for the Eastern District of Missouri

Nos. 11,412 and 11,413—May Term, A. D. 1939

THE OHIO OIL COMPANY, Appellant,

vs.

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor, Appellee

Appeals from the District Court of the United States for the Eastern District of Missouri

[August 29, 1939]

Mr. Thomas H. Cobbs and Mr. Craig Van Meter (Mr. William H. Armstrong and Mr. Fred H. Kelly were with them on the brief) for appellants.

[fol. 169] Mr. Thomas T. Railey (Mr. Russell L. Dearmont was with him on the brief) for appellee.

Before Sanborn and Thomas, Circuit Judges, and Sullivan, District Judge.

OPINION

THOMAS, Circuit Judge, delivered the opinion of the court:

These are four appeals in bankruptcy consolidated by stipulation of the parties and presented upon a single record. There are but two appellants, and two of the appeals are precautionary only. The issues arise in sum-

mary proceedings under section 77 of the Bankruptcy Act (Section 205, Title 11, U. S. C. A.) for the reorganization of a railroad in In the Matter of Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor. The appeals are from an interlocutory order entered November 14, 1938.

The summary proceeding in which the dispute arises was commenced by the appellee trustee on November 1, 1938, on which date he filed a petition in the bankruptcy court having jurisdiction of the reorganization proceedings. The petition was entitled "Petition of Trustee for Determination of Title and for Advice and Directions Respecting Certain Proposed Oil Operations on Right-of-way Near Salem, Illinois."

The petition alleged that by orders previously entered in the reorganization proceedings the trustee had been granted blanket authority to enter into gas and oil leases and to contract for the drilling of oil wells on the rights of way of the debtor companies; that the right of way of the subsidiary Missouri-Illinois Railroad traverses territory in Illinois where oil deposits under the ground have been proved to exist in paying quantities; and that the trustee had accordingly solicited bids for lease of oil rights upon the right of way of the subsidiary across Section 20, Township 2 North, Range 2 East of the 3rd P. M., in Marion County, Illinois.

It was further alleged that the appellant oil companies had served notice upon the trustee questioning his right and title to the oil under the right of way; that he is advised that there may be other parties, unknown by name, who will [fol. 170] contend that they own certain interests in portions of the oil and gas underlying the right of way; and that "because of these possible adverse claims, Trustee now seeks advice and directions of the Court in the premises."

It is then alleged that the subsidiary had, and that the trustee has succeeded to, the title originally conveyed to the Centralia & Chester Railroad Company by the three following warranty deeds. The first, dated August 13, 1896, conveys

"A strip of land for right of way for said railroad Company Sixty feet wide over and across the Southwest Quarter (¼) of the Northeast Quarter (¼) of Section Twenty

(20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian."

The second deed, dated August 14, 1896, conveys

"A strip of ground Sixty-six (66) feet wide for right-of-way for said Railroad Company over and across the East Half (½) of the Northwest Quarter (¼) of the Southwest Quarter (¼) of Section Twenty (20) in Township Two (2) North, Range Two (2) East of the Third Principal Meridian."

The third deed, dated January 3, 1898, was executed by Caroline Ruster, a widow, and purports to convey

"A strip of ground for right-of-way for said Company Sixty feet (60) wide over and across the Southeast Quarter (¼) of the Northeast Quarter (¼) and the West Half (½) of the Northwest Quarter (¼) of the Southwest Quarter (¼) and the Southeast Quarter (¼) of the Northwest Quarter (¼), all of said lands in Section Twenty (20), Town- Two (2) North, Range Two (2) East of the third principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located."

It was further alleged that the petitioner is advised, and believes that shortly after the conveyances were delivered, the lands so conveyed had been fenced and used by the trustee and his predecessors without interruption for at least 20 years; and that he believes that he is lawfully vested with title to all the oil and mineral rights under the land.

[fol. 171] The petition then alleges:

"Petitioner is advised and believes that numerous oil wells have been drilled in close proximity to Trustee's right-of-way, and that unless prompt action be taken to remove the oil underlying said right-of-way, it will be drained into the wells on adjacent lands, and the value thereof will be forever lost to the stockholders and creditors of the Missouri-Illinois Railroad Company.

"This court of bankruptcy, by reason of Trustee's possession of said property, has jurisdiction, under Section 77 of the Bankruptcy Act, to determine all questions respecting title thereto, and pending the determination of said title,

has jurisdiction to instruct and direct Trustee to take such action as the Court may deem advisable to prevent the waste of said oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined, and has authority to direct that the expenses thereof be paid out of the proceeds of the oil so recovered. It is not, in the opinion of Trustee, practicable or advisable to await the adjudication of adverse claims and the possible review of this Court's decision respecting title before beginning the drilling for oil upon said right-of-way.

"After a careful analysis of the various bids hereinabove referred to, and having due regard for financial backing, experience, and reputation of the bidders, and the terms and conditions offered, Trustee is advised and believes that the bid most favorable to the trust estate is that made by the Blackstock Oil Company.

"Subject to the approval of this Court, Trustee has therefore negotiated a contract with Blackstock Oil Company, copy of which is filed herewith as 'Exhibit A.'"

The proposed contract with the Blackstock Oil Company is then set out in full.

The petitioner recommended that appellants be subpoenaed and that notice be published directed to other claimants to appear and show cause, upon a day fixed, why the court should not decree that the oil and mineral rights under the right of way across section 20 is not vested in the petitioner, and that upon their failure to show cause they be enjoined from asserting title to the land or to the oil and gas thereunder; and that the petitioner be authorized to [fol. 172] execute the contract with the Blackstock Oil Company, to sell the oil and to impound the profits for the benefit of the owners as finally determined by the court.

On November 9, 1938, the appellant oil companies appeared and filed answers to the trustee's petition. They alleged that they held oil leases from the owners of the fee titles to the lands in question by virtue of which they were the owners of the oil, gas and minerals underlying said lands. They admitted the execution and delivery of the deeds relied upon by the trustee, but alleged that the deeds conveyed only railroad right of way easements over the land and did not convey the oil and gas rights thereunder; and they denied that the trustee or his predecessors in interest had ever had title to or possession of the oil, gas and mineral rights underlying the right of way. They denied

that the court had jurisdiction in this summary proceeding to determine the adverse claims of the parties to the oil and gas rights on the ground that the trustee had neither actual nor constructive possession of the underlying oil and gas. They alleged that the trustee, having only an easement, had no right to let a contract for the drilling of wells on the right of way to the underlying oil deposits, and that the court was without jurisdiction to direct him to do so. They denied title by adverse possession; and it was alleged that Caroline Rusler at the time she executed and delivered the third deed, set out above, owned only an undivided one-half interest in the land described therein.

A hearing was had before the court upon the petition of the trustee and the answers of the appellants on November 9, 1938. In his opening statement to the court, counsel for the trustee said that the trustee asked the court to issue an order of publication bringing in any adverse claimants who are unknown and that the court hear evidence and determine the claims to adverse title. He then proceeded:

"Since the printing of this publication will require some time, or may require some time and the oil under the right of way be dissipated and drawn into other wells pending this delay, the Trustee, following precedents often followed in these oil cases, has asked the Court to vest Mr. Thompson, as Trustee of the Missouri-Illinois Railroad, with the same authority that is usually vested in an independent receiver appointed pendente lite, that is, with the power to [fol. 173] drill—to enter into a drilling contract, to conserve and sell the oil, and to hold the proceeds of the oil for the account of whom concerned, as determined by the subsequent order of this Court, paying out in oil, as far as possible, the reasonable expenses of drilling, conserving and selling the oil. * * *

"The question, therefore, is whether the conveyance of a strip of land for right of way sixty feet wide is a conveyance of a fee simple title of that land, the description of right of way being merely descriptive and for the purpose of locating the particular narrow strip of land, or whether that is merely a conveyance of a right of way which would be a mere easement for railroad purposes and, according to the claim of these adverse claimants, would not authorize the Trustee to drill and retain the oil underlying that property. That is the real question that is before this court,

and it may be necessary for the Court to make up his mind on that question in connection with this particular motion (petition)."

The testimony taken on the hearing is set out in the record. The deeds relied upon by the trustee and the leases under which the appellants claim were admitted in evidence. The other testimony was directed to the claim of the trustee that numerous oil wells have been drilled in close proximity to the right of way and that unless prompt action be taken to remove the oil it would be drained off and lost; to the cost of drilling and the number of wells necessary to preserve the oil; and to the ability of the Blackstock Oil Company to drill the wells and market the oil.

It was stipulated that Mrs. Rusler had but a half interest in the land described in the deed executed by her, and that the railroad had been on the land and that it had been fenced for over twenty years.

The interlocutory order appealed from enjoined, until the court may order otherwise, all parties, regardless of whether their appearance shall have been entered in these proceedings, from asserting or attempting to enforce, other than in these proceedings, any adverse claim to the premises or to the mineral, oil or gas in or underlying said premises or extracted therefrom, or from attacking or interfering with the title thereto of any purchaser holding under or through the trustee.

[fol. 174] The interlocutory order also purported to vest the trustee with title to the oil and gas underlying or removed from the premises with right to convey the title thereto free and clear of all claims predicated upon alleged adverse ownership of any part of the land upon which the right of way is situated. The order further authorized the trustee to enter into a contract with Blackstock Oil Company to drill not more than six wells on the right of way over the lands title to which is in dispute, and to remove, conserve and market the oil and gas taken from the premises. It was provided that the proceeds from the sale of such oil and gas shall be paid over to the trustee, after deducting the expenses provided for in the contract and other necessary expenses in drilling, removing, conserving and marketing said oil and gas; and that the trustee shall hold the remainder of the proceeds for the account of ad-

verse claimants and parties in interest as their respective rights may hereafter be determined by the court.

The order also provided for publication of notice to all claimants to appear and show cause why the court should not decree that the trustee is not vested with title to all the oil and mineral rights under its right of way across said section 20; and the court reserved jurisdiction to hear on their merits any adverse claims to title.

It is clear that the trustee in this summary proceeding, by his petition for advice and directions, sought an order of the court of bankruptcy in the nature of a decree quieting title to its right of way across Section 20 against the appellant oil companies and unknown claimants. He further sought an order clothing him with the powers of a receiver pendente lite and authorizing him to extract the oil underlying the right of way and to market it. The appellants challenged the jurisdiction of the court to determine title or to grant the trustee the requested powers. The court not only granted all the trustee asked, but also enjoined appellants and all other claimants from asserting any rights or claims other than in these proceedings and from interfering with the drilling of wells and marketing the oil. In vesting the trustee with the powers of a receiver and authorizing him to drill wells and sell the oil, no bond for the protection of the appellants was required and no restrictions were imposed upon the price for which the oil [fol. 175] may be sold nor the expenses which may be incurred in producing it.

The first question presented upon this appeal, as it was the first question for the determination of the court below, relates to the jurisdiction of the district court as a court of bankruptcy to determine in a summary proceeding the adverse claims to the fee title to the land underlying the railroad right of way in which the oil deposits are found.

It is now settled that the bankruptcy court has power in a summary proceeding to adjudicate, without consent, controversies concerning the title to property the physical possession of which is in the actual or constructive possession of the trustee, and, with consent of the adverse claimants, the title to property not in the possession of the trustee; but the court is without power to adjudicate adversary claims to the title to property, without consent, not in the actual or constructive possession of the trustee. See Taubel-Scott-Kitzmiller Company, Inc. v. Fox, et al., 264 U. S. 426, 432-3;

Steelman v. All Continent Corp., 301 U. S. 278, 286; Schumacher v. Beeler, 293 U. S. 367; Taylor v. Sternberg, 293 U. S. 470; First Nat. Bank v. Conway Road Estates Co., 8 Cir., 94 F. (2d) 736, 737; In re Prima Co., 7 Cir., 98 F. (2d) 952, 957.

Upon the question of possession and jurisdiction, the court found:

"(a) That said Guy A. Thompson, as Trustee, Missouri-Illinois Railroad Co., Debtor, acting under the jurisdiction of this Court, is in actual possession of the property hereinbefore described, under assertion of claim to fee-simple title thereto, and that this Court has accordingly jurisdiction over the subject matter and is vested with authority to determine the interest of adverse claimants in and to the mineral, oil and gas rights in and underlying said property and to protect the interest of the Trustee therein."

The appellants contend that the court erred in finding that the trustee is in actual possession of the property, and that it consequently erred in assuming jurisdiction to go forward and make the order complained of here. The evi- [fol. 176] dence to support this finding consists of the deeds conveying the right of way to the trustee's predecessor in interest and the admission that the railroad company has constructed and operates a railroad thereover. Counsel for the parties agree that if the deeds conveyed a fee simple title to the strip of land granted such title and possession are sufficient to support the jurisdiction of the court to adjudicate the controversy; and they also agree that if the deeds grant and convey a railroad right of way easement only, such possession did not extend either actually or constructively to the oil and gas underlying the right of way, from which it would follow that the court was without jurisdiction.

In United States v. Corrick, 298 U. S. 435, 487, the Supreme Court said that "On appeal from the granting or refusal of an interlocutory injunction our inquiry is limited to the question whether the court abused its discretion." The court held in that case that when "want of jurisdiction is evident upon the face of the bill" such action by the lower court constitutes an abuse of discretion. If we go no further at this point than to discuss the subject of jurisdiction, that rule must be applicable in the present case. Here the peti-

tion of the trustee sets out the deeds under which he claims to have derived a fee simple title to the land under the right of way, and under which his predecessor took possession. The deeds are the basis of his claim to actual possession as well as of his claim to the right of possession of the oil and gas. When, therefore, the court found that the trustee is in "actual possession" he was bound to find, and his finding implies, that the deeds in question conveyed a fee simple title to, and not an easement in, the strip of land described.

This situation compels this court, in order to arrive at a conclusion as to whether or not the lower court abused its discretion in entering the order appealed from, to consider and determine whether or not the deeds conveyed a fee simple title or only a railroad right of way easement. Stated concretely, the question to be answered is whether a warranty deed conveying to a railroad company "A strip of ground (land) 60 (66) feet wide for right of way for said railroad Company over and across" a larger tract of land vests a fee simple title in the grantee or only a railroad right of way easement.

[fol. 177] Counsel for the parties agree that since the land in question is situated in Illinois the construction of the deeds is controlled by the laws of that state. Ruhlin v. New York Life Ins. Co., 304 U. S. 202; Benedict v. Ratner, 268 U. S. 353, 359; Buford v. Kerr, 8 Cir., 90 F. 513, 514. No Illinois decision has been found in which a deed or other conveyance has been construed where the granting clause is identical with that found in the deeds under consideration. Under these circumstances we have no choice but to analyze the issues for ourselves, exercising an independent judgment with respect to the issues presented, aided by and with deference to the Illinois law of conveyancing. Driscoll v. Edison Light & Power Co., — U. S. — 59 S. Ct. 715, 83 L. ed. — .; Terry v. New York Life Ins. Co., 8 Cir. 104 F. (2d) 498, 502; Verbest, Trustee, v. Michael Yundt Company, 8 Cir., (decided July 19, 1939); New York Life Ins. Co. v. Jackson, 7 Cir., 98 F. (2d) 950, 952.

Under Illinois law a railroad company may acquire its right of way by condemnation (Section 13 Article 2 of the Constitution of Illinois) or by deed. The estate acquired by condemnation proceedings is an easement only, and the fee remains in the owner. Chicago & E. I. R. Co. v. Clapp, 201

Ill. 418, 66 N. E. 223; Branch v. Central Trust Co., 320 Ill. 432, 151 N. E. 284, 288. The estate acquired by deed may be either an easement or a fee simple title. If the deed grants a right of way only the fee remains in the grantor and the railroad company is vested with an easement and can use the land for railroad purposes only. Wiggins Ferry Co. v. O. M. Ry. Co., 94 Ill. 83; Ill. Cent. R. Co. v. O'Connor, 154 Ill. 550, 39 N. E. 563; Walker v. Ill. Cent. R. Co., 215 Ill. 610, 74 N. E. 812; Branch v. Central Trust Co., supra; Joseph v. Evans, 338 Ill. 11, 170 N. E. 10, 14. But the company may acquire by deed an unlimited fee simple estate in the land used by it for its right of way or for other railway purposes. Ill. R. S. 1927, c. 114, § 20 (3); Walker v. Ill. Cent. R. Co., supra; Spierling v. Ohl, 232 Ill. 581, 83 N. E. 1068; and see Rockford Trust Co. v. Moon, 370 Ill. 250, 18 N. E. 2d 447; Noyes v. St. Louis, A. & T. H. R. Co., (Ill.) 21 N. E. 487.

Prior to the adoption of the Conveyancing Act in Illinois deeds were construed according to the rules of the common [fol. 178] law, and the word "heirs" was essential to an inter vivos conveyance of an estate of inheritance. A grant of land to "A and his heirs" was held sufficient to convey a fee simple title, and so far as the habendum clause in the deed was inconsistent it was held void. The Conveyancing Act was designed to abolish the technical rules of the common law relating to the construction of deeds. It provided (Ill. R. S. 1937, c. 30, § 12) that "Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance, be not added, shall be deemed a fee-simple estate of inheritance if a less estate be not limited by express words or do not appear to have been granted, conveyed or devised by construction or operation of law." Under this statute the use of the word "heirs" is no longer necessary to the conveyance of a fee; and "the estate granted may be defined or limited by language used in any part of the deed without reference to the rule of construction as to the granting clause." Harder v. Matthews, 309 Ill. 548, 141 N. E. 442, 444.

While the statute, supra, requires that every estate shall be deemed an estate in fee unless a contrary intention is clearly expressed, it is not essential that express words of limitation be used if it appears by necessary implication that

a less estate was granted. Lehndorf v. Cope, (Ill.) 13 N. E. 505; Hempstead v. Hempstead, 285 Ill. 448, 120 N. E. 782.

In the construction of deeds to which the conveyancing statute is applicable the Illinois court has repeatedly held that the primary object is to ascertain and give effect to the intention of the parties unless to do so will violate an established rule of property. Cover v. James, 217 Ill. 309, 75 N. E. 490; Waller v. Hildebrecht, 295 Ill. 116, 128 N. E. 807; Bear v. Milliken Trust Co., 336 Ill. 366, 168 N. E. 349; Woods v. Seymour, 350 Ill. 493, 183 N. E. 458. "Where words of inheritance are not used, the entire context may be considered, and every word used must, if possible, be given weight in determining the estate granted." Woods v. Seymour, supra; Bear v. Milliken Trust Co., supra. Force should be given to each clause and the intention of the parties as gathered from a consideration of the whole instrument is to be given effect; no word or term employed by the parties should be rejected as meaningless or surplusage. Mittel v. Karl, (Ill.) [fol. 179] 24 N. E. 553; Bauman v. Stoller, 235 Ill. 480, 85 N. E. 657; Kearney v. Kirkland, 279 Ill. 516, 117 N. E. 100. But in ascertaining this intention "the courts are not confined to the strict and literal construction of the language used when to do so will frustrate the intention of the parties as gathered from the four corners of the instrument." Kearney v. Kirkland, supra; McCoy v. Fahrney, (Ill.) 55 N. E. 61; Bear v. Milliken Trust Co., supra.

The deeds under consideration are statutory deeds without words of inheritance. The paramount rule of construction should, therefore, be to give effect to the intent of the grantor, if it is legal, as collected from the whole instrument; but, if doubt as to the meaning of the words used arises, such doubt must be resolved in favor of the grantee, unless surrounding circumstances indicate a contrary intent. Williams v. Swango, 365 Ill. 549, 7 N. E. 2d 306, 309; Wise v. Wouters, 288 Ill. 29, 123 N. E. 35.

It is necessary in applying these rules of conveyancing and of the construction of deeds to keep in mind the distinction on the one hand between a fee in land and the description in the grant of a fee and on the other hand a railroad right of way easement and the description in the grant of such an easement.

The grant of a fee in land conveys to the grantee complete ownership, immediately and forever, with the right of pos-

session from boundary to boundary and from the center of the earth to the sky, together with all lawful uses thereof. Under Illinois law a deed will effect this result if it contains appropriate words of grant and a definite description of the land. If the deed is in this form and in addition contains words stating the purpose or use contemplated by the parties to the contract such words are regarded as surplusage and not as conditions or restrictions, as will be pointed out below. The two esentials of such a deed are the words of grant and the clear description of the thing granted.

The essentials of the conveyance of an easement are also the words of grant and the description of the thing granted; but an easement is not the compete ownership of land with the right to use it for all lawful purposes perpetually and throughout its entire extent. An easement is a right only to one or more particular uses; and a deed conveying an [fol. 180] easement must not only describe the land to which the use granted attaches, but it must also describe the particular use or uses permitted. Words, therefore, which, if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed.

An examination of the deeds under consideration with the Illinois law and rules of construction in mind is, we think, convincing that in each of them the clear intent, expressly stated, was to convey to the railroad company only a right of way easement for its railroad, and not a fee. The language used to describe the easement is apt and appropriate for that purpose and no other. It designates the land to be subject to the use—"a strip of land 60 (66) feet wide * * * over and across"; it describes the use permitted—"for a right of way for said railroad." This language makes it perfectly clear that the parties met for the sole purpose of contracting for a railroad right of way. Obviously the railroad company was interested at that time in no other use of the land else it would assuredly have acquired more than a strip of land 60 feet wide.

Counsel for appellee argue that the words "over and across", as used in the deeds, are descriptive of the words "right of way", and the words "right of way" are descriptive of location by reference to the intended use of the "strip of ground" to be conveyed. In this we think they err. The words "over and across" are descriptive of the location of

the "strip of ground", and the words "for right of way" describe the use or easement, that is, the estate intended to be conveyed. No other view can be reconciled with the language of the Rusler deed where there is added to the description the words, "it being the strip of land over and across said above described tracts of land where the said Railroad is now located." The Rusler deed was executed in 1898 and the other two in 1896. Apparently the railroad had not been located when the earlier deeds were made, but we perceive no sound reason why they should be construed differently.

To sustain the contention that the deeds to the railroad company convey a fee the appellee, emphasizing the words "for a right of way for said railroad company", relies upon cases holding that where a deed conveying a fee contains [fol. 181] words merely declaratory of the purpose of the conveyance such words do not, of themselves, render the estate conditional nor operate as a restriction upon its use. Rockford Trust Co. v. Moon, 370 Ill. 250, 18 N. E. 2d 447; Weihe v. Lorenz, 254 Ill. 195, 98 N. E. 268; Downen v. Rayburn, 214 Ill. 342, 73 N. E. 364; Tinker v. Forbes, 136 Ill. 221, 26 N. E. 503; Warren County v. Patterson, 56 Ill. 111; Noyes v. St. Louis, A. & T. H. R. Co., (Ill.) 21 N. E. 487. A brief analysis of these cases discloses that they are not in point.

In the Moon case, supra, the grant was of a definitely described tract of land to a railroad company. Standing alone at the end of the deed were the words: "Growing out of the construction and operation of the railroad of said Company, its successors and assigns." The issue decided arose in a suit to quiet title after the land ceased to be used for railroad purposes. It was contended that the quoted words of the deed created a right of entry for condition broken or a possibility of reverter when the land ceased to be used for railroad purposes. In denying this contention the court said: "Even where the deed contains words stating the consideration for or the purpose of the conveyance, they do not, of themselves, render an estate conditional * * *. The clause in the deed has no meaning and stands alone."

In the Weihe case, supra, the deed conveyed a tract of land described by metes and bounds, and added "I also give ten feet wide adjoining on the south of this tract, or the strip between this tract and the alley I gave in my deed of September 3, 1881, to John Lorenz, for alley purposes." The

court held that the words, "for alley purposes" did not limit the estate granted.

In the Patterson case, supra, the grantor agreed to sell to the grantee "block number 16 in the City of Monmouth * * * for Court House and other County Buildings." The court held in substance that the words "for Court House" etc. did not create a condition nor limitation on the power of alienation.

In the Tinker case, supra, the deed conveyed lots 12 and 13 and also, "for the purpose of locating the proper water wheels and races to draw said water, the east half of lot 9" etc. In an injunction suit to restrain the construction of a building on the east half of lot 9 the court held that the quoted words did not constitute a condition nor indicate an [fol. 182] intention that the appropriation of the premises to any other purposes should have the effect of defeating the estate granted.

The case of Downen v. Rayburn, supra, was an action of ejectment; and the issue was whether the conveyance of "a certain tract or parcel of land to be used as a church location * * * described as follows: Lot No. 16, in block No. 5, * * * to have and to hold the said premises * * * forever" vested a fee simple or a conditional fee. The question of whether or not the deed vested an easement was not raised. The court observed that "If the words in question (to be used as a church location) can be regarded in any sense a condition, they must constitute a condition subsequent, and not a condition precedent. 'A subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated.'" It was held that the words in question do not constitute a condition subsequent but are merely declaratory of the purpose of the conveyance.

Noyes v. St. Louis, A. & T. H. R. Co., supra, was a suit to remove a cloud or title. Following the granting clause in a deed to two railroad companies was the statement: "The above tract is granted to said companies for the erection and maintenance thereon of the freight house of said companies, or either of them, together with side tracks, turn-outs, switches, fixtures, and buildings, and for such other general railroad purposes as may be necessary and convenient for said company." The issue was whether these words constituted a condition subsequent rendering the grant liable to be defeated by failure to perform the

conditions imposed. The court observed that the language used is very broad and general; that it authorizes the use of the ground for general railroad purposes as well as for the specific purposes named; that "The property at all times has been used for railroad purposes, and has at no time been devoted to any other or different use;" and the court said: "We are not inclined to hold that the deed vested the title in the grantees upon condition to be subsequently performed; and if the grant was conditional we could not say, from the record in this cause, that in the use made by the grantees and their assigns of this land there is such a substantial failure to perform as would justify the setting aside of the deed."

[fol. 183] Counsel in effect concede that the issue in each of these cases was whether the deeds granted a fee or a conditional fee; while in the present case the question is whether the instruments convey a fee or a railroad right of way easement. But, they say, "Each of the decisions does specifically hold that language designating the intended use to which the property conveyed is to be subjected, does not constitute a limitation or restriction upon the absolute fee-simple title that would otherwise be conveyed"; and they contend that if a declaration of the use intended to be made in the conveyance of a fee does not limit the grant, then the same sort of description of the use can not change the grant from a fee to an easement. Therefore, they conclude, the conveyance of a "strip of land for right of way for said railroad company" is a conveyance of the fee title and not of an easement solely for railroad purposes.

The argument confuses the language necessary to the description in the grant of estates of different types. A fee and a perpetual easement, as in these deeds, are both freeholds in Illinois. Funston v. Hoffman, 232 Ill. 360, 83 N. E. 917, 918. Both may be conveyed subject to conditions and limitations. But the description of the use or easement in the one cannot be compared with the declaration of purpose in the other without obscuring the intent of the grantor of the easement.

It is further argued upon this point that in any event a railroad right of way has the attributes of a conditional fee, the implied inference again being that the effect of words used to declare the purpose of the grant of a fee is the same as the effect of similar words used to describe an intent

to convey a railroad right of way easement. To support this reasoning counsel cite Walker v. Ill. Cent. R. Co., 215 Ill. 610, 74 N. E. 812; Oswold v. Wolf, 126 Ill. 542, 19 N. E. 28; Western Union Tel. Co. v. Penn. R. R. Co., 195 U. S. 540, 570; New Mexico v. United States Trust Co., 172 U. S. 171; and Meyer v. Pittsburg C., C. & St. L. Ry. Co. (Ind. app.), 113 N E. 443. These decisions are based upon the fact that the degree of interest in land granted in an easement differs with the nature of the easement. In an easement for a path or way over land the interest is slight; in an easement for a canal for flowage right the degree of interest is much greater. In one sense some of the attributes of a fee may inhere in an easement. [fol. 184] As pointed out in the Walker case, supra, a right of way for a railroad is an easement, which includes the right to use a strip of land perpetually and practically exclusively. No unauthorized person has any right upon the premises for any purpose. This is very different from saying that such a right of way is a conditional fee. Although the grant of a railroad right of way gives a right to the exclusive use of the surface for railroad purposes it does not convey a fee title to the oil and gas several hundred feet below the surface. Extracting the oil and gas and selling them is not an element of use for railway right of way.

These arguments, while in some respects persuasive, are not convincing. It must be true according to the rules of construction of deeds prevailing in Illinois and recited above that the only purpose of construction is to determine the intent of the parties, or more particularly of the grantor. This is true when the dispute is whether the grant is of a fee or a conditional fee as well as when the question is whether it is a fee or an easement. But when the court examines the writing to discover the grantor's intent as expressed therein the inquiry is not the same in the two cases. When it is admitted that the instrument grants a fee courts do not look with favor upon conditions subsequent, and words indicating purpose or use will not be construed as restrictions, Noyes v. St. Louis, A. & T. H. R. Co., supra; but the distinguishing characteristic of an easement is a use, and the instrument creating the right must give a reasonably accurate description of the right conveyed. 19 C. J. 906. The Supreme Court of Illinois did not ignore words descriptive of the purpose of the grant when it be-

came necessary to determine the issue of whether a deed operated as a conveyance of a fee or of an easement in Waller v. Hildebrecht, supra. And in the deeds now before us the words "for right of way for said railroad company" cannot be disregarded without violating the fundamental rule of construction that the intent of the parties must be gathered from the instrument as a whole.

In the Waller case, supra, it was held that considering the object to be attained a warranty deed granting for a stated consideration the east 10 feet of lot 7 and the south 10 feet of lot 6 "to be used as alley, only, in common by [fol. 185] both parties hereto" conveyed a right of way only and not a fee. And the construction to be placed upon right of way deeds in general is illustrated in the opinion of the Supreme Court of Illinois in the case of Branch v. Central Trust Co., 320 Ill. 432, 151 N. E. 284.

While the decisions of courts of other jurisdictions construing deeds similar to the deeds involved in this cause are in conflict we think the weight of authority supports the views herein expressed. Some of the leading cases pro and con are cited in the footnote.[1] The generally accepted

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[1] Pro: Abercrombie v. Simmons, 71 Kans. 538, 81 P. 208, 1 L. R. A. (N. S.) 806, 114 Am. St. Rep. 500, 6 Ann. Cas. 239; Roxana Petroleum Corp. v. Jarvis, (Kans.) 273 P. 661; Danielson v. Woestmeyer (Kans.) 293 P. 507; Chicago Great Western R. Co. v. Zahner, (Minn.) 177 N. W. 350; Norton v. Duluth Transfer Co., (Minn.) 151 N. W. 907; State v. Griffith, (Mo.) 114 S. W. 2d. 976; Kansas City Southern Ry. Co. v. Sandlin, (Mo. App.) 158 S. W. 857; City of Knoxville v. Phillips (Tenn.) 36 S. W. 2d. 434; Parks v. Gates, (Cal.) 199 P. 40; Blakely v. Chicago, K. & N. R. Co., (Nebr.) 64 N. W. 972; Fitchburg R. Co. v. Frost, (Mass.) 16 N. E. 773; Rogers v. Pitchford, (Ga.) 184 S. E. 623; Gaston v. Gainesville & D. Electric Ry. Co., (Ga.) 48 S. E. 188; Noel Estate v. Kansas City Southern & Gulf Ry. Co., (La.) 175 So. 468; and see Alabama Great Southern R. Co. v. McWhorter, (Ala.) 80 So. 839; Netherlands American M. Bank v. Eastern Ry. & L. Co. (Wash.) 252 P. 916; Barton v. Jarvis, (Ky. app.) 291 S. W. 38; Ottumwa, C. F. & St. P. R. Co. v. McWilliams, (Ia.) 32 N. W. 315; Jones v. Van Bochove (Mich.) 61 N. W. 342; Quinn v. Pere Marquette Ry. Co., (Mich.) 239 N. W. 376; People v. Walsh, (N. Y.) 105 N. E. 136; Robinson v. Missisquoi R. Co. (Vt.) 10 A. 522; Atlanta,

rule is stated in 1 Thompson on Real Property 534, par. 421, as follows:

"Where the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed."

We are not unmindful that in construing a deed somewhat similar to the deeds involved in this case the district court of Illinois in Carter Oil Company v. Welker, 24 F. Supp. 753, reached the conclusion that the deed vested a fee simple title in the railroad company, and not an easement. While that decision commands great respect, in so far as it is inconsistent, if at all, with the views herein expressed, we are not inclined to follow it.

[fol. 186] A further question for consideration concerns the rights of the parties to the oil and gas underlying the land described in the deed by Mrs. Rusler. We do not regard the difference in this and in the other two deeds as of any consequence. This deed vested only a railroad right of way easement in the grantee at most. The parties have stipulated that the deed was executed and delivered by Mrs. Rusler to the trustee's remote grantor; that at that time she owned only an undivided half interest in the premises described in the deed; and that the railroad company has had possession of the right of way over the land and has

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B. & A. Ry. Co. v. Coffee County (Ga.) 110 S. E. 214; New York Cent. & H. R. R. Co. v. Aldridge, 135 N. Y. 83, 32 N. E. 50.

Contra: Marland v Gillespie (Okla.) 33 P. 2d. 207; Brightwell v. International-Great Northern R. Co., (Tex.) 49 S. W. 2d. 437; Johnson v. Yaldosta, M. & W. R. Co., (Ga.) 150 S. E. 845; Killgore v. Cabell County Court, (W. Va.) 92 S. E. 562; Ballard v. Louisville & N. R. Co., (Ky. app.) 5 S. W. 484; and Compare Sherman v. Sherman, (S. D.) 122 N. W. 379; Arkansas Improvement Co. v. Kansas City So. Ry. Co., (La.) 181 So. 445; Breckinridge v. Delaware L. & W. R. Co., (N. J. Ch.) 33 A. 800; Concklin v. New York Cent. & H. R. R. Co., 134 N. Y. S. 191; Stevens v. Galveston, H. & S. A. Ry. Co., (Tex. app.) 212 S. W. 639; Groce v. Southern Ry. Co., (S. C.) 162 S. E. 425; Radetsky v. Jorgensen, (Colo.) 202 P. 175; Des Moines City Ry. Co. v. City of Des Moines, (Ia.) 159 N. W. 450.

had the land under fence for more than 20 years. It is conceded that there is a defect in the title; but appellee claims that such defect has been cured by the statute of limitations.

Since we hold that the deed granted only an easement to the railroad company, it follows that the possession of the trustee and his grantors under the deed did not extend to the oil and gas underlying the land. It also follows that possession of the surface for a railroad right of way was not notice of a claim to the oil and gas thereunder. Branch v. Central Trust Co., supra. Under the issues the court is not called upon to determine whether or not the railroad company has acquired complete title to its right of way over the land by adverse possession.

Counsel for appellee in their briefs argue that even conceding that the court was without jurisdiction to determine title to the mineral and oil rights because the trustee was not in actual or constructive possession, that part of the order appointing a receiver pendente lite with authority to take possession, drill wells and extract and sell the oil was not an abuse of discretion. It cannot be said that the appointment of a receiver under such circumstances is not erroneous nor that if he takes possession from the owner under such a void appointment that his act is not wrongful. Compare: Burnrite Coal Co. v. Riggs, 274 U. S. 208; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 640; Atlantic Trust Co. v. Chapman, 208 U. S. 360; United States v. Stone, 7 Cir., 187 Fed. 577; Noxon Chemical Products Co. v. Leckie, 3 Cir., 39 F. (2d) 318; W. F. Potts Son & Co. v. Cochrane, 5 Cir., 59 F. (2d) 375; Beach v. Macon Grocery Co., 5 Cir., 125 Fed. 513; In re Forty-one Thirty-six Wilcox Bldg. Corp., 7 Cir., 100 F. (2d) 588.

[fol. 187] But there is no occasion for this court to consider that part of the order appointing a receiver pendente lite at this time. The record does not show that the receiver took possession under the order appealed from; nor that the authorized contract was executed with the Blackstock Oil Company; nor that wells were ever drilled and oil taken and sold; nor that the appellants have sustained any damages as a result of any acts of the receiver. If it should be that the appellants claim to have a cause of action against the petitioner in his capacity, either as trustee or as receiver it is presumed that the court will determine and adjudicate such claim according to the settled rules of equity applicable.

We hold that the petition on its face showed that the petitioner was not in possession, actual or constructive, of the mineral, oil and gas rights underlying the railroad right of way over and across the three tracts of land described in the deeds relied upon; that, consequently, the court was without jurisdiction to make the order appealed from; and that the order was wholly void.

It follows that the interlocutory order must be and it is reversed in its entirety with directions to the court below to dismiss the petition for want of jurisdiction.

Reversed.

[fol. 188] In United States Circuit Court of Appeals, Eighth Circuit

No. 11,410

Magnolia Petroleum Company, Appellant,

vs.

Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor

No. 11,411

Magnolia Petroleum Company, Appellant,

vs.

Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor

No. 11,412

The Ohio Oil Company, Appellant,

vs.

Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor

No. 11,413

THE OHIO OIL COMPANY, Appellant,

vs.

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor

Appeals from the District Court of the United States for the Eastern District of Missouri

[fol. 189] DECREE—September 5, 1939

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the interlocutory order of the said District Court appealed from, in these causes be, and the same is hereby, reversed in its entirety, with costs; and that the Magnolia Petroleum Company and The Ohio Oil Company have and recover against Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor, the sum of — Dollars for their costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that these causes be, and they are hereby, remanded to the said District Court with directions to dismiss, for want of jurisdiction, the Petition of Trustee for Determination of Title and for Advice and Directions respecting certain Proposed Oil Operations on Right-of-way near Salem, Illinois.

[fol. 190] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Nos. 11,410-11,411

Nos. 11,412-11,413

[Titles omitted]

PETITION FOR HEARING—Filed September 18, 1939

Comes now Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, appellee, and respectfully peti-

tions this Court for a rehearing for the reasons following, to wit:

1

The Court has erred in holding, in effect, that a description of the use for railroad right of way, following the grant of the tract or strip of land in question, is a limitation of the use of the land for right of way purposes—in other words, an easement. In reaching its conclusion this [fol. 191] Court has failed to give proper weight to such authoritative decisions as Rio Grande Western Ry. Co. v. Stringham, 239 U. S. 44, 47, holding that a railroad right of way is in reality nothing more nor less than a limited fee in the nature of an easement; and this Court has erred in failing to follow such authoritative decisions of the Supreme Court of Illinois as Downen v. Rayburn, 214 Ill. 342, 73 N. E. 364, to the effect that a description of the intended use following the grant is not to be construed as a limitation upon the use of the grant unless the contrary clearly appears. And, in the light of the authoritative Illinois decisions, this Court has erred in failing to hold that a contrary intention is not evidenced upon the face of the conveyances in question.

2

This Court, in construing the language, "a strip of land for right of way for said railroad company sixty feet wide over and across the * * *," has erred in holding that the words "over and across" have reference to "a strip of land" and in effect signifies surface rights only; and the Court has erred in failing to find that the language quoted is equally susceptible of an interpretation to the effect that the words "over and across" have reference to the right of way and are intended merely to distinguish and locate by use the particular strip of land conveyed.

3

The Court erred in failing to hold that, regardless of the final outcome of this case, the bankruptcy court had jurisdiction to determine whether its trustee was in actual or constructive possession, and, pending determination of this issue, which involved both facts and law, had jurisdiction to vest trustee with the powers of a receiver pendente lite for the purpose of conserving the oil underlying

[fol. 192] the right of way and directing that the cost thereof be a charge upon the proceeds from the sale of the oil so removed; and in reaching its conclusion the Court has erred in failing to distinguish between cases where the lower court has no jurisdiction and cases such as the one at issue, where the lower court does have jurisdiction at least for the purpose of determining the issues of fact and law respecting possession.

4

This Court has erred in holding that the lower court was without jurisdiction even to determine the question of possession, notwithstanding the voluntary appearance of appellants and their unreserved participation in the submission of this issue to the lower court.

5

The Court has erred in directing the court below to dismiss the petition for want of jurisdiction, predicating its conclusion solely upon the language in the deeds, thus precluding any opportunity on the part of appellee to offer testimony tending to show how the grantors and their successors in interest have themselves interpreted the conveyances.

Wherefore, appellee respectfully requests the granting of this petition for rehearing.

Russell L. Dearmont, Thos. T. Railey, Attorneys for Appellee.

[fol. 193] Certificate of Counsel

I hereby certify that this petition is filed in good faith and is believed by me to be meritorious.

Thos. T. Railey.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—September 26, 1939

The petition for rehearing filed by counsel for appellee, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Com-

pany, Debtor, in these causes having been consolidated, It is now here ordered by this Court that the same, be, and it is hereby, denied.

In United States Circuit Court of Appeals

Motion of Appellee to Stay Issuance of Mandate—Filed Oct. 2, 1939

Appellee respectfully presents to the Court that on September 27, 1939, an order was entered denying Appellee's petition for rehearing, and Appellee, intending in good faith to prosecute application for certiorari to the Supreme Court of the United States, now prays for a thirty-day stay of the mandate in the above-described proceedings.

Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, by Russell L. Dearmont, Thos. T. Railey, Attorneys for Appellee.

[fol. 194] [File endorsement omitted.]

In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—October 3, 1939

On Consideration of the motion of appellee for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

[fols. 195-196] In United States Circuit Court of Appeals

Order Denying Motion to Set Aside Order Staying Issuance of Mandate, on Condition, etc.—October 6, 1939

These causes came on this day to be heard on the motion of appellants to set aside the order of October 3, 1939, of this

Court, staying the issuance of mandate without requiring bond pending a petition by appellees to the Supreme Court of the United States for a writ of certiorari.

After hearing counsel, Mr. Craig Van Meter for appellants and Mr. Thomas T. Railey for appellees, It is ordered by this Court that the aforesaid motion, be, and it is hereby, denied, on condition however that no further oil be taken by appellees from the right of way involved in these causes without permission of this Court, pending petition of appellees for a writ of certiorari in the Supreme Court of the United States.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 197] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 4, 1939

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

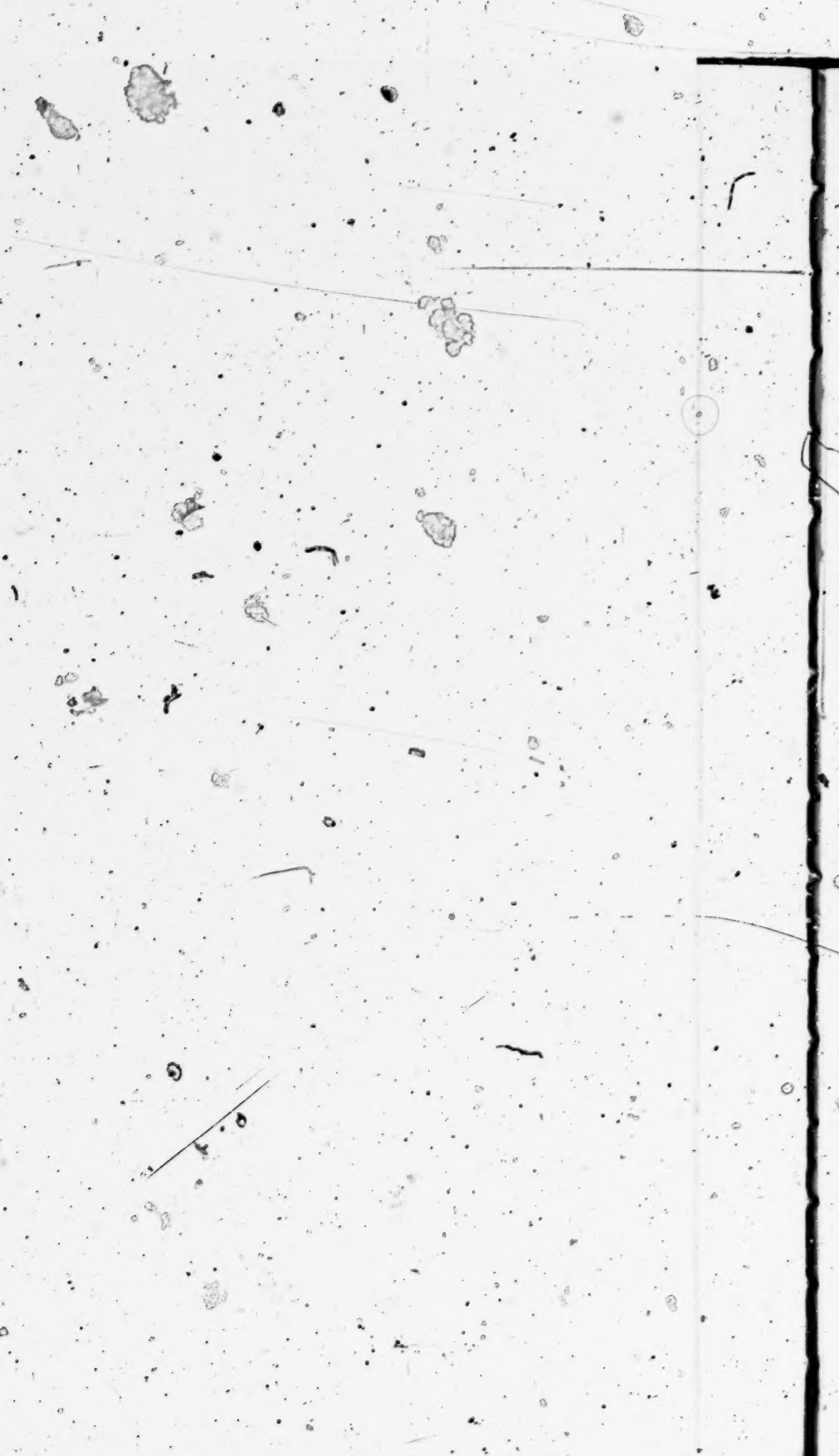
A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43,888. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 481. Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, petitioner, vs. Magnolia Petroleum Company and The Ohio Oil Company. Petition for a writ of certiorari and exhibit thereto. Filed October 23, 1939. Term No. 481, O. T. 1939.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit and

BRIEF IN SUPPORT THEREOF.

RUSSELL L. DEARMONT,
THOS. T. RAILEY,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. .....

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor (appellee in the court below), respectfully presents:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review the decision and decree made and entered in said

Circuit Court of Appeals on August 29th and September 5th, 1939, respectively (Sanborn and Thomas, Circuit Judges, and Sullivan, District Judge, sitting), by which an interlocutory decree of the District Court, sitting as a Court of Bankruptcy, was reversed in consolidated cases, wherein Magnolia Petroleum Co. and Ohio Oil Co., respectively, were appellants and petitioner was appellee, bearing Court of Appeals docket numbers 11,410 to 11,413, inclusive.

On application of petitioner, the issuance of the mandate of the Circuit Court of Appeals was stayed to afford petitioner an opportunity to apply to this Court for writ of certiorari.

STATEMENT.

Petitioner is the duly appointed, qualified and acting Trustee of Missouri-Illinois Railroad Company, a subsidiary debtor in the reorganization proceedings of Missouri Pacific Railroad Company, pending in the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, under the provisions of Section 77 of the Bankruptcy Act.

The line of the Missouri-Illinois Railroad traverses the recently proven Salem oil field in Marion County, Illinois. Adverse claims to the oil underlying the right of way were asserted by Magnolia Petroleum Company and Ohio Oil Company, predicated upon certain alleged leases, on the theory that petitioner has a mere easement in the railroad right of way. Petitioner has contended and now contends that the deeds to his predecessor in interest respecting the strip of land on which the railroad is situated conveyed the fee-simple title, including oil and mineral rights. The controversy primarily concerns the interpretation of the granting clause of these warranty deeds,

which conveyed to Trustee's predecessor in interest "*a strip of ground for right of way of said Railroad Company.*"

It seemed apparent that these contentions would result in prolonged litigation, during which time the oil would be drained from under the right of way into nearby wells, thus resulting in a serious loss to the trust estate in the event Trustee's claim to title be upheld. Trustee therefore petitioned the bankruptcy court for an order permitting the oil to be removed from the right of way, the proceeds from the sale thereof, after defraying the expenses of drilling, conserving, and selling the oil, to be impounded as a trust fund for the account of whom concerned, pending final determination of the controversy.

Magnolia Petroleum Company and Ohio Oil Company entered their appearance, and the Bankruptcy Court, after hearing testimony respecting the probability of the oil being rapidly drained from under the right of way, found this to be a fact, and that it justified the immediate drilling of wells for the conservation of the oil (R. 58). The Court accordingly ordered that the proceeds of the oil so removed from the right of way be impounded; ordered other possible adverse claimants brought in by publication; and retained jurisdiction to hear further evidence and determine adverse claims to title (R. 59-61).

Magnolia Petroleum Company and Ohio Oil Company appealed from this *interlocutory decree* on the theory that the deeds upon which Trustee relied conveyed, by their granting clauses, a mere easement for railroad purposes, and that the Trustee therefore was in neither actual nor constructive possession of the underlying minerals.

The Court of Appeals sustained this contention and held that the Bankruptcy Court was without jurisdiction over the parties or subject matter of the litigation (R. 183, 184).

JURISDICTION.

This petition for writ of certiorari is prosecuted pursuant to the provisions of Section 240 of the *Judicial Code (Title 28, Section 347, U. S. Code)* and *Section 24* of the *Bankruptcy Act* [*Chandler Bill, Title 11, Section 47 (c), U. S. Code*].

There are involved matters of general importance respecting the jurisdiction of the bankruptcy courts and their authority to enter appropriate orders conserving perishable and fugitive substances in litigation pending determination of actual or constructive possession of the *res* by trustees in bankruptcy. Petitioner further contends that the decision sought to be reviewed is in direct conflict with controlling decisions of the State of Illinois; is in conflict with authoritative decisions of this Court; and in at least one respect is in conflict with the rulings of the Circuit of Appeals of the Fifth Circuit, as hereinafter more fully stated.

The opinion and decree of the Circuit Court of Appeals sought to be reviewed were filed August 29th and September 5th, 1939, respectively (R. 165, 184). Petition for rehearing was filed September 18, 1939 (R. 187), and the Court's order denying said petition for rehearing was filed September 26, 1939 (R. 187).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The primary questions presented by this petition are summarized as follows:

(1) The Court of Appeals held that the petition on its face showed that the petitioner was not in possession, actual or constructive, of the underlying oil rights, and directed the court below to dismiss the petition for want

of jurisdiction (R. 183). Whether the granting clauses of these deeds, which were quoted verbatim in Trustee's petition, conveyed the fee absolute or merely a railroad easement presented an intricate question of law, and a question upon which Trustee should have been permitted to offer evidence showing the interpretation of the deeds by the grantors and their successors in interest. Pending determination of these questions of fact and law and their review by the Appellate Courts, the lower court had jurisdiction to enter an appropriate order conserving the subject matter of the litigation. It is accordingly the contention of petitioner that the lower court had jurisdiction to act pending determination of the question of possession, and that the decision of the Court of Appeals to the contrary is in conflict with such authoritative decisions of this Court as *Traubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 432.

(2) It is inadvertently stated in the opinion sought to be reviewed that counsel "also agree that if the deeds grant and convey a railroad right-of-way easement only, such possession did not extend either actually or constructively to the oil and gas underlying the right of way" (R. 172). This is not quite correct. What counsel did verbally admit was that under the Illinois decisions, a railroad which had a mere easement did not hold adversely to the owners of the fee within the contemplation of the statute granting title by adverse possession. Petitioner most earnestly insists that a railroad easement constitutes possession of both the surface and the subsoil. It is, as stated by this Court, a fee, the use of which is limited to railroad purposes with right of reverter when the use for railroad purposes has ended. The owner of a railroad easement may be in possession of the subsoil so as to give the Bankruptcy Court jurisdiction without that possession being adverse to the constructive rights of the owners of

the underlying minerals. To give the Bankruptcy Court jurisdiction to pass upon the merits of this controversy, it suffices to prove *possession* without the necessity of proving *adverse possession.* Petitioner would therefore present to this Court for determination the important question of whether possession of a railroad easement by a trustee in bankruptcy constitutes such possession of the subsoil and of the water, oil and other fugitive substances found therein as to vest the Bankruptcy Court with jurisdiction to determine questions respecting title.

(3) In the decision sought to be reviewed, it is conceded by the Court of Appeals that the Illinois decisions are controlling (R. 173), and that these decisions are to the effect that any ambiguity in the granting clause is to be resolved in favor of the grantee (R. 175) and against any limitation of the fee (R. 175-179). (*Rockford Trust Co. v. Moon*, 370 Ill. 250, 18 N. E. [2] 447; *Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268; *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 504; *Warren County v. Patterson*, 56 Ill. 111; *Noyes v. St. L. A. & T. H. R. R. Co.*, 21 N. E. 487.) The Court of Appeals has erred in failing to follow these authoritative Illinois decisions and in erroneously holding that they are not applicable to the conveyances in question for the alleged, and we think misconceived, reason that the conveyance of a railroad right-of-way easement is to be distinguished from the conveyance of the fee subject to limitations or conditions. The Supreme Court of Illinois, in the cases cited, in construing the grant of a strip of land "*for alley purposes,*" a tract of land "*for schoolhouse,*" certain lots "*for the purpose of locating the proper water wheels and races to draw said water,*" a tract or parcel of land "*to be used as a church location,*" and a tract of land "*for the erection and maintenance thereon of said tracks, turnouts, switches, fixtures and buildings, and for such other gen-*

eral railroad purposes as may be necessary and convenient for said company," has in each instance held that the language following the grant is merely descriptive of the use and not a limitation of the fee. These authoritative rulings are specifically admitted in the opinion of the Court of Appeals (R. 177), but the Court has erroneously failed to follow them.

(4) In failing to follow the authoritative decisions of the Supreme Court of Illinois last aforesaid and in attempting to distinguish a railroad easement from the conveyances referred to in these Illinois authorities dealing with limitations of fees, the Court of Appeals in the decision sought to be reviewed has ignored and is in conflict with such authoritative decisions of this Court as *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, and *Kern River Co. v. U. S.*, 257 U. S. 147, 151, to the effect that a railroad or drainage right of way "is neither a mere easement, nor a fee simple absolute, but *a limited fee*, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted." In other words, the Court of Appeals has erred in failing to hold that the grant of a railroad right of way is nothing more nor less than a limited fee in the nature of an easement, and has accordingly erred in failing to apply the foregoing authoritative Illinois decisions in construing the conveyances in question.

(5) The Rusler deed, unlike the others, contained the following supplemental description, to wit: "it being the strip of land over and across said above-described tracts of land where the said railroad is now located" (R. 167). In construing this language in the decision sought to be reviewed (R. 176), the Court's interpretation is in direct conflict with the interpretation of a similar deed by the

Circuit Court of Appeals of the Fifth Circuit in *Kynard v. Halen*, 5 Fed. (2) 160, 162.

Wherefore, petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit to certify and send to this Court a full and complete transcript of the record herein, bearing the Court of Appeals docket numbers 11,410 to 11,413, inclusive, consolidated, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the decision of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

GUY A. THOMPSON,
Trustee, Missouri-Illinois Railroad Company,
Debtor,

By RUSSELL L. DEARMONT,
THOS. T. RAILEY,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Thirteen oil wells have been drilled by petitioner on the right of way of Missouri-Illinois Railroad through the Salem oil field pursuant to orders of the Bankruptcy Court. As of September 1, 1939, the money received from the sale of oil and impounded in a special account awaiting directions of the Bankruptcy Court aggregated $472,000, of which, pursuant to orders of court, approximately $225,000 has been spent for drilling, producing and marketing the oil from these wells. It has been estimated that the total value of the oil available to be drawn from this right of way approximates one million dollars. We emphasize these facts, which are not in the record, merely to impress upon the Court the importance of this litigation.

CONTROLLING ILLINOIS DECISIONS DISREGARDED.

The principal issue here involved is thus stated in the opinion of the Court of Appeals now sought to be reviewed, to wit (R. 173):

> "The question to be answered is whether a warranty deed conveying to a railroad 'a strip of ground (land) 60 (66) ft. wide for right of way for said railroad company over and across' a larger tract of land vests a fee-simple title in the grantee or only a railroad right of way easement."

In expressing its ultimate conclusion on this issue the Court of Appeals in its opinion says (R. 176):

> "An examination of the deeds under consideration, *with the Illinois law and rules of construction in*

mind, is, we think, convincing that in each of them the clear intent, expressly stated, was to convey to the Railroad Company only a right-of-way easement for its railroad, and not a fee."

The fallacy of this conclusion is that the Court of Appeals did not keep "*the Illinois law and rules of construction in mind*," or at least did not apply these rules or give them the weight that is required by the decisions of this Court with respect to matters where the state decisions are controlling. Under the authoritative Illinois decisions it is well settled that in the construction of deeds all doubt should be resolved in favor of the grantee and in favor of the free use of the property as against conditions, restrictions and limitations. Following these principles the Supreme Court of Illinois, as admitted in the opinion under consideration (R. 177-179), has held that the descriptive phrases hereinafter referred to are not limitations or conditions imposed upon the fee, to wit:

(a) Conveyance of a strip 10 feet wide "*for alley purposes*" (*Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268).

(b) The granting of a lot "*for the purpose of locating a proper water wheel and races to draw said water*" (*Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503).

(c) Conveyance of a certain tract or parcel of land "*to be used as a church location*" (*Deiwen v. Rayburn*, 214 Ill. 342, 73 N. E. 364).

(d) Conveyance of a tract of land to a railroad company "*for the erection and maintenance thereon of the freight house of said companies, or either of them, together with said tracks, turn-outs, switches, fixtures, and buildings, and for such other general railroad purposes as may be necessary and convenient for said company*" (*Noyes v. St. L. A. & T. H. R. R. Co.*, 21 N. E. 487).

In *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 634, which is representative of the cases cited, the Court had under consideration a warranty deed from Downen and wife to certain church trustees conveying

> "A certain tract of land *to be used as a church location,* situated * * *."

The rules of interpretation applicable to this language would seem equally applicable to the conveyance of

> "A certain tract or parcel of land *to be used as a railroad right of way,* situated * * *."

Quoting from the Illinois decision referred to:

> "It is well settled that where real property is conveyed in fee restrictions in the use are not favored, although courts will enforce such restrictions where the intention of the parties is clear in the creation of restrictions or limitations upon the use of a grant. It is also well settled that 'in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee *all doubts should, as a general rule, be resolved in favor of a free use of property, and against restrictions.*' * * * It will be noticed that the words in question, 'to be used as a church location,' stand alone, and that the words 'upon condition' are not used in connection therewith. That is to say, it is not stated in the deed that the premises are conveyed upon condition that they are to be used as a church location. Nor is there any provision in the deed for re-entry by the grantor in case of a breach of the covenant, if it be a covenant, that the premises are to used as a church location. * * *
>
> "Here the words in question, 'to be used as a church location,' are merely declaratory of 'the purpose of the conveyance.' It cannot be said, therefore, that they render the estate conditional."

The opinion of the Court of Appeals sought to be reviewed hurdles these Illinois decisions and starts with the assumption that the deeds in question were intended to convey merely easements. With this premise the Court then argues that the Illinois rules of construction applicable to limitation of fees are not applicable to the conveyance of easements. Quoting, by way of illustration, from the opinion under consideration (R. 176):

> "Words, therefore, which if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed."

After admitting the holdings of the Illinois courts above referred to, the Court of Appeals states (R. 179):

> "Counsel in effect concede that the issue involved in each of these cases [Illinois decisions cited] was whether the deeds granted a fee or a conditional fee, *while in the present case the question is whether the instruments convey a fee or a railroad right-of-way easement.*"

Further quoting from the Court of Appeals' opinion (R. 180):

> "It must be true according to the rules of construction of deeds prevailing in Illinois and recited above that the only purpose of construction is to determine the intent of the parties, or more particularly, of the grantor. This is true when the dispute is whether the grant is of a fee or a conditional fee, as well as when the question is whether it is a fee or an easement. *But when the court examines the writing to discover the grantor's intent as expressed therein, the inquiry is not the same in the two cases.*"

This reasoning is fallacious. A railroad right of way "is neither a mere easement nor a fee simple absolute,

but a limited fee." This Court has so held in *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, and there is no authoritative Illinois decision to the contrary. In determining whether the deeds in question convey the fee simple absolute or merely a limited fee in the nature of an easement, we must first turn to the authoritative Illinois decisions to determine whether such language is considered sufficiently ambiguous to justify application of rules of construction; and finding this to be true, we must then apply the foregoing authoritative Illinois decisions, resolving the doubt in favor of the grantee and in favor of the fee simple absolute conveyance. In the light of these Illinois decisions the language "*for railroad right of way,*" following the conveyance of a strip of ground, is merely descriptive of its use for the purpose of definitely locating the particular strip of ground in question, and no other interpretation can be reconciled with the foregoing authoritative Illinois decisions.

What the Appellate Court has to say with respect to the interpretation of deeds conveying easements is entirely beside the point, for the reason that the real question at issue is not how a deed conveying an easement is to be interpreted, but whether these deeds convey easements.

In support of its conclusion the Court of Appeals, in the decision sought to be reviewed, states (R. 180):

> "The Supreme Court of Illinois did not ignore words descriptive of the purpose of the grant when it became necessary to determine the issue of whether a deed operated as a conveyance of a fee or of an easement in *Waller v. Hilderbrecht*" [295 Ill. 116, 128 N. E. 807].

The case cited is irrelevant. The facts were:

> "Andrew Michaels and wife executed a warranty deed conveying for a stated consideration of two

thousand dollars the east 10 feet of Lot 7 and the south 10 feet of Lot 6 to William Grus, husband of Mary A. Grus, *'to be used as alley, only, in common by both parties thereto.'* "

Quoting from the opinion:

"In her answer to appellee's bill to quiet title, *appellant claimed no more than an easement* in this tract of land. The appellant by her answer, which by stipulation stood as her cross bill, *did not claim to be the owner in fee* of this piece of property * * *."

In the light of these facts and admissions, the Court said:

"Generally speaking, where a particular or special right or easement in land is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed."

In the case referred to, the conveyance was for alley purposes *only*, and appellant claimed no more than an easement in the tract of land. The distinction is obvious, and yet this is the one case that the Court of Appeals has cited attempting to justify its utter disregard of the authoritative Illinois decisions hereinabove referred to.

Failures of Courts of Appeals to follow and apply the authoritative decisions of the state courts in cases of this kind have repeatedly been held to justify the granting of certiorari (*Forsythe v. City of Hammond*, 166 U. S. 506, 514). We assume from certain statements appearing in the opinion that the Court of Appeals reached the conclusion that the Illinois decisions referred to were not controlling upon the erroneous assumption that the conveyance of an easement for railroad purposes constituted something entirely different from the conveyance of the

limited or conditional fees referred to in the Illinois cases cited. If we are correct in this assumption, then the failure of the Court of Appeals to follow this Court's decision in *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, to the effect that a railroad right of way *is a limited fee*, warrants the granting of this application for certiorari *(Joplin Merc. Co. v. U. S.*, 236 U. S. 531).

JURISDICTION OF THE BANKRUPTCY COURT INVOLVED.

If the Court of Appeals in the decision sought to be reviewed has correctly concluded that the petitioner has merely an easement for railroad purposes, then two important jurisdictional questions arising under the Federal Bankruptcy Act are presented.

(1) The first of these questions is whether *mere possession*, as distinguished from *adverse possession*, is sufficient to give the Bankruptcy Court jurisdiction. The Illinois courts have held that the owner of an easement does not hold adversely to the owner of the fee within the contemplation of the statutes relating to title by adverse possession. On the other hand, as stated by this Court in *Western Union v. Penn. R. Co.*, 195 U. S. 540, 570:

> "A railroad right of way is a very substantial thing. *It is more than a mere right of passage.* It is more than an easement. * * * A railroad right of way has therefore the substantiality of the fee, and is private property, even to the public, in all else but the interest and benefit in its uses."

If we correctly understand the decisions of this Court, a railroad right of way is a fee limited in use to railroad purposes, and with a right of reverter upon discontinuance of the use for railroad purposes.

We therefore respectfully submit that while a railroad company which has acquired a mere easement does not hold adversely to the owner of the mineral rights underlying the right of way, yet the railroad easement does imply at least limited possession of the subsoil sufficient to prevent the removal of the subsoil or other interference with its use for railroad purposes. Possession of such an easement is therefore possession of the mineral and oil underlying the right of way at least to the extent of giving the Bankruptcy Court jurisdiction to determine ownership.

This important question of federal law, while directly involved in this case, was not discussed in the opinion of the Court of Appeals, and so far as we can find, has not heretofore been presented to this Court. In view of the large number of railroads now in process of reorganization under the Federal Bankruptcy Act, the question is of such importance as to justify the granting of certiorari in this case.

(2) The second jurisdictional issue which was brushed aside by the Court of Appeals involves the right of the Bankruptcy Court as a preliminary inquiry *to determine its own jurisdiction to proceed to examine and decide in a summary proceeding the merits of an adverse claim.*

As stated by this Court in *Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al., Trustees,* 264 U. S. 426, 432:

> "As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court."

Intricate legal questions were involved in determining Trustee's possession, upon which it was contended the Court's jurisdiction depended, and pending the determination of this question of possession and its review on appeal the Bankruptcy Court, we respectfully submit, had jurisdiction to enter appropriate orders conserving the subject matter of litigation.

The District Court specifically found (R. 58):

> "(b) That immediate action is necessary to conserve the oil supply underlying said property for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court;
>
> "(c) That this Court has authority to direct that the expenses thereof be borne, in so far as possible, out of the proceeds of the oil so removed."

No assignment of error was urged by appellants against this finding of the Bankruptcy Court.

There is ample authority warranting the action of the District Court in directing that the oil be removed from under the right of way and the proceeds from the sale retained as a trust fund for the account of whom concerned (*Malone v. Barnett*, 87 S. W. [2] 523 [Texas]; *Chancellor v. Guerra*, 85 S. W. [2] 663 [Texas]; *United North & South Oil Co. v. Meredith*, 258 S. W. 550 [Texas]; *Ohio Fuel Oil Co. v. Burdett*, 72 W. Va. 803, 79 S. E. 667; *Oklahoma v. Texas*, 252 U. S. 372, and 253 U. S. 465).

The importance of these jurisdictional questions arising under an act of Congress is, we respectfully submit, sufficient to justify the granting of this petition for certiorari.

THE OPINION IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Differences of opinion arose as to the meaning of the words "over and across," as used in the granting clause of the deed, to wit (R. 167):

> "A strip of land for right of way of said Railroad Company 60 ft. wide *over and across* the Southwest Quarter * * *"

Do the words "over and across" modify "a strip of land," or do they modify the words "right of way"? Either interpretation might be justified.

But in the Rusler deed appears the further language (R. 167):

> "* * * it being the strip of land over and across said above-described tracts of land where the said railroad is now located."

The Court of Appeals in the opinion sought to be reviewed apparently reasons that the strip of land referred to is over something, and that it was therefore not the intention to convey the subsoil and mineral rights. If this be the conclusion the Court of Appeals has sought to convey, then it is in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Kynerd v. Hulen*, 5 Fed. (2) 160, 162, wherein the Court said:

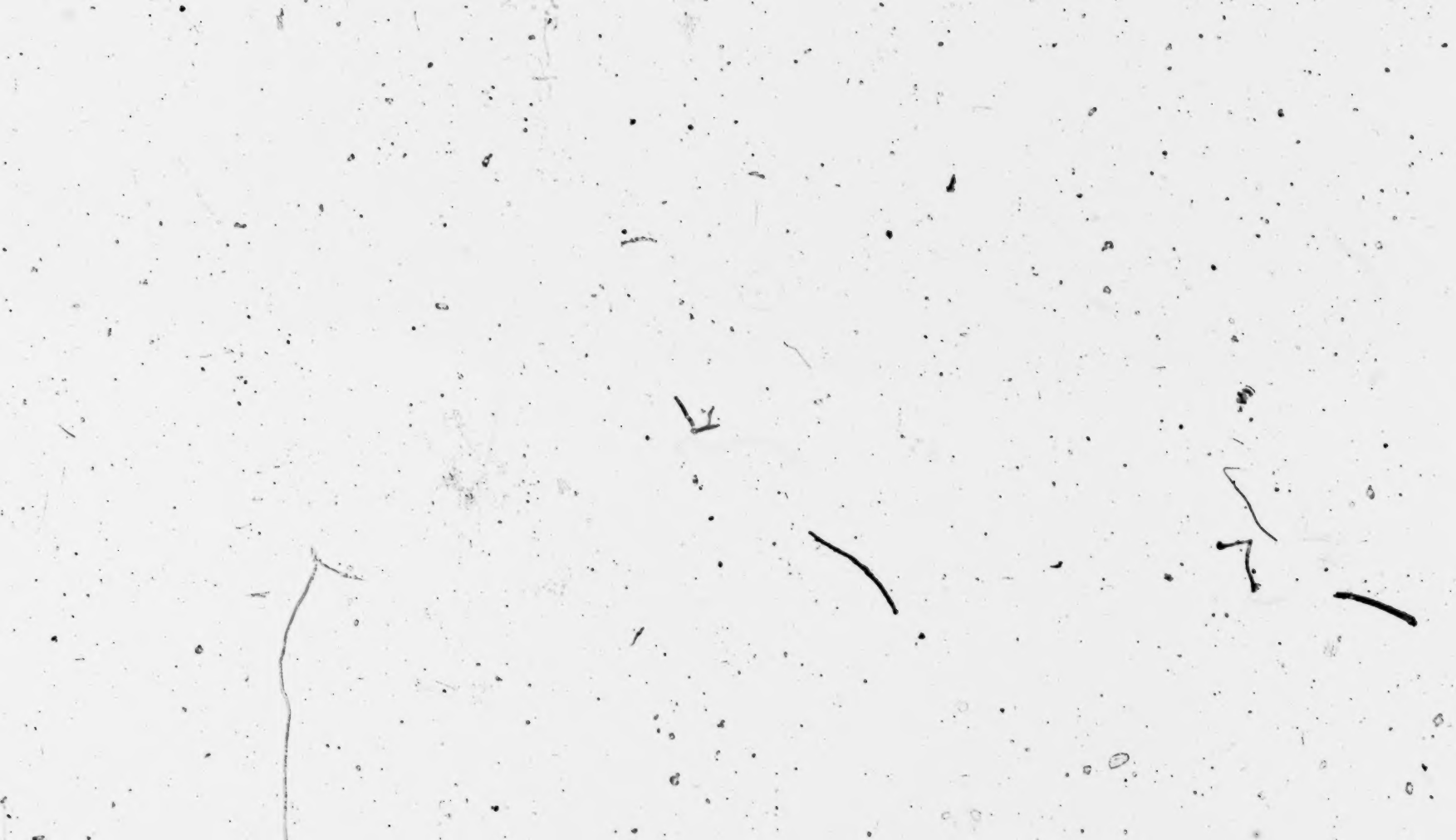
> "Plaintiff's whole case is built upon the use of the one word 'over.' It is argued that the use of that word demonstrates that there was something 'under' which was not being conveyed, and which later turned out to be oil. In our opinion, 'over' is synonymous with 'through' and 'through and over' conveys no

meaning different from what would have been expressed if the words 'and over' had been left out."

Conflict between decisions of Courts of Appeals is a recognized ground for the granting of certiorari.

Respectfully submitted,

RUSSELL L. DEARMONT,
THOS. T. RAILEY,
Attorneys for Petitioner.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RUSSELL L. DEARMONT,
THOS. T. RAILEY,
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Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, respectfully presents that since the filing of petitioner's "Petition for Certi-

orari" on October 23, 1939, the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Carter Oil Company v. Welker* (Dockets 6856 and 6861), in an opinion handed down November 6, 1939, involving facts identical to those in the case at bar, cites and refuses to follow the decision of the Circuit Court of Appeals of the Eighth Circuit in the decision which petitioner is here seeking to have reviewed, and directly affirms the decision of *Carter Oil Company v. Welker*, 24 Fed. Supp. 753, which the Circuit Court of Appeals of the Eighth Circuit, in the opinion under consideration, cited and directly refused to follow (R. 181).

Wherefore, petitioner includes as a supplement to his original petition for certiorari now under consideration a further ground for review by this Court, to wit: —.

> That the decision of the Circuit Court of Appeals of the Eighth Circuit in the decision here sought to be reviewed is in direct conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Carter Oil Company v. Welker* (Dockets 6856 and 6861), handed down November 6, 1939, copy of which is hereto attached and printed as Exhibit A.

Wherefore, petitioner respectfully prays that this Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit to certify and send to this Court a full and complete transcript of the record herein bearing the Court of Appeals Docket Nos. 11,410 and 11,413, inclusive, consolidated, to the end that said case may be reviewed and determined by this Court as provided by law, and that the decision of the Circuit Court of Appeals may be reversed, and that your

petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

GUY A. THOMPSON,
Trustee,

Missouri-Illinois Railroad Company,
Debtor,

By RUSSELL L. DEARMONT,
THOS. T. RAILEY,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF FOREGOING SUPPLEMENT TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Judge Lindley, sitting as the United States District Court for the Eastern District of Illinois, handed down October 13, 1938, his decision in *Carter Oil Co. v. Welker*, 24 Fed. Supp. 753, which involved an issue identical to that presented in the opinion of the Circuit Court of Appeals of the Eighth Circuit in the *Magnolia case* here sought to be reviewed. Petitioners strongly relied upon the District Court decision in the *Carter Oil Company case*, and in disposing of it the Court of Appeals for the Eighth Circuit, in the *Magnolia case* under review, said (R. 181):

> "We are not unmindful that in construing a deed somewhat similar to the deeds involved in this case the District Court of Illinois, in *Carter Oil Company v. Welker*, 24 F. Supp. 753, reached the conclusion that the deed vested a fee simple title in the railroad company, and not an easement. While that decision commands great respect, in so far as it is inconsistent, if at all, with the views herein expressed, we are not inclined to follow it."

The *Carter Oil Co. case* referred to was affirmed, and the reasoning of Judge Lindley in that decision was followed by the Circuit Court of Appeals of the Seventh Circuit in the decision handed down November 6, 1939, hereinafter copied in full as Exhibit A.

The Court of Appeals for the Seventh Circuit, in referring to the decision of the Circuit Court of Appeals in the *Magnolia case* here sought to be reviewed, states:

> "The difficulty of the question is well illustrated by the fact that opposite conclusions were reached by

the District Court in the case at bar (see *Carter Oil Co. v. Welker*, 24 F. Supp. 752) and the Court of Appeals for the Eighth Circuit in the *Magnolia case, supra*, both after very scholarly study of the issues and the authorities upon precisely the same type of deed and both arising under the Illinois law. Since the opinions in both of those cases contain excellent analyses of the significant cases bearing on the subject as well as the applicable Illinois statutes, we deem it unnecessary to repeat that discussion here, and therefore refer to only a few of the cases.

"While the Illinois courts have not passed on the identical question involved, there are several cases to the effect that the recitation of the purpose of the conveyance does not limit the title conveyed. See *Supervisors v. Patterson*, 56 Ill. 111; *Tinker v. Forbes*, 136 Ill. 221; *Downen v. Rayburn*, 214 Ill. 342, all relied upon by the District Court. In these cases we find the conveyance of a lot or tract, 'for a courthouse and other county buildings,' 'also for the purpose of locating proper water wheel and races to draw water,' 'to be used as a church location,' all of which conveyances were held to transfer the fee simple interest, notwithstanding the recitation of purpose. The *Magnolia case* holds that these cases are not authority for the construction of the deed here involved for the reason that in those cases the question was whether a fee simple was conveyed or only a determinable fee, and that in such cases the courts do not look with favor upon conditions subsequent, hence will not construe words indicating purpose or use as restrictions. The situation is different, it holds, when the question is whether a fee is conveyed or only an easement, in which case words 'which, if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed.'

"We do not agree with this distinction."

* * * * * * *

"We conclude that, in the absence of a contrary

decision by the Illinois courts, we prefer to follow the rule that a deed conveying a strip of land, even though the purpose be recited, is to be construed as conveying a fee simple interest in the grantee rather than an easement of use. We do not agree with appellant's contention that the words 'over and across' written in longhand in the deed limited the conveyance to an easement. We think the words 'over and across' refer only to the surveyed line by which the exact location of the land was to be determined.

. . . . . .

"Decree affirmed."

The conflict between the *Carter Oil Company decision* and the *Magnolia Oil Company decision* under review is apparent, and as this supplemental petition has been filed within the time allowed by the rules of this court for the filing of petitions for writ of certiorari, we respectfully urge that this conflict between decisions of the Courts of Appeals of different circuits be given consideration.

Respectfully submitted,

RUSSELL L. DEARMONT,,
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Attorneys for Petitioner.

EXHIBIT A.

[Decision of the Circuit Court of Appeals of the Seventh Circuit handed down November 6, 1939, in direct conflict with the decision of the Eighth Circuit sought to be reviewed.]

In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term and Session, 1939.

No. 6856.

The Carter Oil Company,
Plaintiff-Appellant,

vs.

John F. Welker et al.,
Defendants-Appellees.

No. 6861.

The Carter Oil Company,
Plaintiff-Appellee,

vs.

John F. Welker and Nellie E. Welker,
Defendants-Appellants.

Appeals from the District Court of the United States for the Eastern District of Illinois.

November 6, 1939.

Before SPARKS, TREANOR and KERNER, *Circuit Judges.*

SPARKS, *Circuit Judge.* The Carter Oil Company appeals from a decree dismissing for want of equity its suit

to enjoin appellees from drilling for oil and gas on certain premises claimed by appellant by virtue of a lease to itself. Appellees counterclaimed with a prayer that the lease upon which appellant based its claim be amended to exclude the premises in dispute, and that appellees' title to those premises be quieted and confirmed in themselves.

This appeal presents the question of the construction of a deed executed in 1912 which appellant contends merely conveyed an easement in the strip of land involved, leaving the fee simple interest in the grantor from whose successors in title it obtained the lease upon which this action is predicated.

The deed in question, executed on a printed form captioned a "Right of Way Deed," provided as follows (italicized portions represent those parts which were written in longhand with pen and ink):

> "This Indenture Witnesseth, That Illinoi W. Hess * * * in consideration of the benefits accruing to *her* by reason of the construction and operation of a railroad upon said land, and of the sum of *Two Hundred Fifty—50/100* Dollar, * * * *does* hereby convey and warrant to Eastern Illinois and Peoria Railroad Company, a corporation organized and existing under the laws of the State of Illinois, as and for its right of way, a strip of land *One Hundred (100)* feet wide, being *Fifty (50)* feet wide on *each side* of a line that has been surveyed and located across and upon the following described real estate, to wit: *Over and across the North-East 1/4 of the North-West 1/4 of Section Eighteen (18) Township Seven (7) North Range Three (3) East of the 3rd P. M. Containing in all Three and Thirty-Four Hundredths acres more or less.*
>
> * * * * * * *

The strip conveyed was part of a 160-acre tract then

belonging to Mrs. Hess, the grantor. At the time of the execution of the deed there had been a survey, and the strip involved had been marked off by stakes extending across the farm. However, at the time of trial, it was testified that the stakes had long since disappeared, and the tenants of the tract across which the strip extended had farmed it along with the balance of the tract. The railroad company had never used the strip for right of way purposes, but it had paid taxes on it from the time of the conveyance. Subsequently the tract was divided between the heirs of Mrs. Hess, and John Welker became the owner of the forty-acre tract across which the 3.34-acre strip previously conveyed to the railroad extended. The partition was made by the parties with the understanding that John would get only 36.66 acres out of the quarter. In addition, he owned several other tracts of land, all of which were included in a lease executed by him and his wife in August, 1936, to one Von Almen who assigned it to appellant, the Carter Oil Company, granting the right to drill for the oil and gas on the premises. The lease described the premises as follows:

> S½ of SE¼ of Sec. 7 containing 80 acres
>
> NE¼ of NE¼ of Sec. 18 containing 40 acres
>
> NE¼ of NW¼ Sec. 18 containing 36 66/100 acres
>
> W. part of N½ of NW¼ and SE¼ of NW¼ of Sec. 8 containing 56 acres, of Section 7-18-8 Township 7 N. Range 3E containing 213 acres, more or less, it being the purpose and intent of the lessor herein to lease all of the lands, however described, owned by the said lessor in the section or sections specified.

Appellees Lutfrell, Holleman, and Hinkle began the drilling operations, now sought to be enjoined, in September, 1938. They held a lease covering the west half of the 3.34-acre strip from one Metzger who obtained title to it

from one Hausmann to whom the railroad had conveyed it. Metzger also held quitclaim deeds to the 3.34-acre strip from all the heirs at law of Mrs. Hess. When appellees started drilling their well, the Carter Oil Company was also drilling an oil well 660 feet from its location, and the court found that if the well drilled by Luttrell, Holleman, and Hinkle were brought in, it would drain oil from under the adjoining land, which oil was owned by the Carter Oil Company.

The court concluded as a matter of law that the deed of 1912 from Mrs. Hess to the railroad conveyed the fee simple interest in the real estate involved, which interest was not limited by the definition in the deed of its purpose, "as and for its right of way." It therefore held that the equities were with the defendants and dismissed the bill of complaint for want of equity. It also concluded, however, that the oil and gas lease executed by the Welkers to appellant's assignor would have conveyed the entire interest in the strip had they been the owners of it, hence appellees would not be entitled to the affirmative relief prayed in their answer and counterclaim.

Whether the particular form of deed here involved results in the creation of a fee simple interest in the grantee or only an easement has never been determined by the Illinois courts so far as we can find. The question has been presented to courts of other jurisdictions and they have divided on their decision of it. See cases cited, pro and con, in a footnote to *Magnolia Petroleum Co.* v. *Thompson*, 106 F. 2d 217 at 227. See also annotations in 84 A. L. R. 271; 94 A. L. R. 523; 66 L. R. A. 36; L. R. A. 1918 B. 695. The difficulty of the question is well illustrated by the fact that opposite conclusions were reached by the District Court in the case at bar (see *Carter Oil Co.* v. *Welker*, 24 F. Supp. 753) and the Court of Appeals for the Eighth Circuit in the Magnolia case, *supra*, both after

very scholarly study of the issues and the authorities upon precisely the same type of deed and both arising under the Illinois law. Since the opinions in both of those cases contain excellent analyses of the significant cases bearing on the subject as well as the applicable Illinois statutes,[1] we deem it unnecessary to repeat that discussion here, and therefore refer to only a few of the cases.

While the Illinois courts have not passed on the identical question involved, there are several cases to the effect that the recitation of the purpose of the conveyance does not limit the title conveyed. See *Supervisors* v. *Patterson*, 56 Ill. 111; *Tinker* v. *Forbes*, 136 Ill. 221; *Downen* v. *Rayburn*, 214 Ill. 342, all relied upon by the District Court. In these cases we find the conveyance of a lot or tract, "for a courthouse and other county buildings," "also for the purpose of locating proper water wheel and races to draw water," "to be used as a church location," all of which conveyances were held to transfer the fee simple interest, notwithstanding the recitation of purpose. The Magnolia case holds that these cases are not authority for the construction of the deed here involved for the reason that in those cases the question was whether a fee simple was conveyed or only a determinable fee, and that in such cases the courts do not look with favor upon conditions subsequent, hence will not construe words indicating purpose or use as restrictions. The situation is different, it holds, when the question is whether a fee is conveyed or only an easement, in which case words "which, if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed."

We do not agree with this distinction. To us, the significant question appears to be, whether *land* is conveyed

[1] Illinois Revised Statutes, 1937, chap. 30, section 12; chap. 114, section 29(3).

by the deed, or merely a *user* of the land. Much of the confusion on this subject has arisen from failure to distinguish between deeds granting the land and deeds granting a right of way over the land. For example, 1 Thompson on Real Property 534, section 421, states: "Where the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed." The Magnolia case quotes this as stating the generally accepted rule, apparently accepting it as authority for the construction of deeds similar to the one here involved. However, the three cases cited by Thompson as supporting his statement involve deeds which are quite unlike the one involved in the case at bar and in the Magnolia case. In *Jones* v. *Van Bochove*, 61 N. W. 342, the deed conveyed "the right of way for a railroad * * and described as follows: 'A strip of land * * *.'" In *Blakely* v. *Chicago R. Co.*, 64 N. W. 972, the significant words were: "Do hereby grant, bargain, sell, and convey unto the * (R. R. Co.) its successors and assigns, for right of way *and for operating its railroad only.*" (Our italics.) *Biles* v. *Tacoma, O. and G. H. R. Co.*, 32 Pac. 211, involved a conveyance by the Northern Pacific Railroad of a forty-acre tract which it then owned, to one Biles, by warranty deed, "reserving and excepting therefrom, however, a strip of land extending through the same * * two hundred feet on each side of the * * (railroad) to be used for a right of way or other railroad purposes * *." Later another railroad laid tracks across the strip and the grantee sought to oust it, claiming title to the land. The court discussed the technical distinction between the words "reserve and except" and decided that since both were used, it became necessary to look at all the surrounding circumstances to determine that an easement was intended to be reserved rather than the fee in the

strip excepted. Since none of the cases cited in the text involves a deed conveying a strip of land as and for a right of way, we do not consider the statement of the rule applicable here.

A similar failure to analyze the deed involved is found in 16 Am. Jur. on Deeds, section 245, which states the rule: "If, in a deed to a railroad, the land conveyed is described as a right of way, the deed may be construed as giving an easement right only, and not the full fee, notwithstanding there are other words in the deed referring to the fee simple, for such a conveyance does not imply a grant of the easement forever." The case cited as authority for this rule is *East Alabama R. Co.* v. *Doe*, 114 U. S. 340. We find, however, that in that case, there was no land conveyed, but the deed recited: "* * doth give, grant, bargain and sell unto the said railroad company * * the right of way over which to pass at all times * * * and to this end the limit of said right of way shall extend * * *". Clearly this was intended to convey only a *right* and not *land*, and the rule as stated above only confuses the issue.

We conclude that, in the absence of a contrary decision by the Illinois courts, we prefer to follow the rule that a deed conveying a strip of land, even though the purpose be recited, is to be construed as conveying a fee simple interest in the grantee rather than an easement of use. We do not agree with appellant's contention that the words "over and across" written in longhand in the deed limited the conveyance to an easement. We think the words "over and across" refer only to the surveyed line by which the exact location of the land was to be determined.

Appellant also contends that, even though the deed might be construed as intended to pass the fee interest, it was void for indefiniteness of description. We do not agree with this contention. While the deed did not specify the exact location of the strip by metes and bounds, it re-

ferred to a survey previously had by which the exact location could be ascertained, and this was sufficient to render the deed effective, particularly in view of the fact that stakes were driven along the line at the time. See 4 Thompson on Real Property (1924), § § 3074, 3095.

Decree affirmed.

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'N THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

BRIEF OF PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

BRIEF OF PETITIONER.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit sought to be reviewed is reported in 106 Fed. Rep. [2] 217.

JURISDICTION.

The petition for writ of certiorari was prosecuted pursuant to the provisions of Section 240 of the *Judicial Code (Title 28, Section 347, U. S. Code)* and *Section 24 of the Bankruptcy Act [Chandler Bill, Title 11, Section 47 (c), U. S. Code]*.

(a) There are involved matters of general importance respecting the jurisdiction of the bankruptcy court, and its authority to enter appropriate orders conserving perishable and fugitive substances in litigation pending determination of actual or constructive possession of the *res* by trustee in bankruptcy, and the decision of the lower court in this respect is in conflict with such decisions of this court as *Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al.*, 264 U. S. 426, 432.

(b) The decision sought to be reviewed is in direct conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit handed down November 6, 1939, in *Carter Oil Co. v. Welker et al.*, set forth in the appendix to this brief, respecting interpretation of the conveyance by an Illinois warranty deed of a strip of land to a railroad company followed by a description of the use, as, for example, "*a strip of land for railroad right of way.*"

(c) The decision sought to be reviewed is in direct conflict with a long line of authoritative decisions of the Supreme Court of Illinois with respect to the conveyance of a strip of land in Illinois for use as a railroad right of way as hereinafter more fully stated.

(d) The decision sought to be reviewed in its interpretation of the words "*over and across*," as used in such a conveyance is in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Kynerd v. Hulen*, 5 Fed. (2) 160, 162.

STATEMENT.

Petitioner is the duly appointed, qualified and acting Trustee of Missouri-Illinois Railroad Company, a subsidiary debtor in the reorganization proceedings of Missouri Pacific Railroad Company, pending in the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, under the provisions of Section 77 of the Bankruptcy Act.

The line of the Missouri-Illinois Railroad traverses the recently proven Salem oil field in Marion County, Illinois. Adverse claims to the oil underlying the right of way were asserted by Magnolia Petroleum Company and Ohio Oil Company, predicated upon certain alleged leases, on the theory that petitioner has a mere easement in the rail road right of way. Petitioner has contended and now contends that the deeds to his predecessor in interest respecting the strip of land on which the railroad is situated conveyed the fee-simple title, including oil and mineral rights. The controversy primarily concerns the interpretation of the granting clause of these warranty deeds, which conveyed to Centralia & Chester Railroad Company, Trustee's predecessor in interest, certain strips of land for right of way of said Railroad Company, to wit (R. 3):

By warranty deed dated August 13, 1896, from *William* and *Emma Young* to said Railroad Company (involved in the Magnolia Company claim—R. 58),

> "A strip of Land for right of way for said Railroad Company Sixty feet wide over and across the South West quarter (¼) of the North East quarter (¼) of Section Twenty (20) Town Two (2) North, Range Two (2) East of the third principal Meridian."

By warranty deed dated August 14, 1896, from *Caleb* and *Sarah Bower* to said Railroad Company (involved in claim of The Ohio Company—R. 68):

"A strip of ground Sixty six (66) feet wide for right of way for said Railroad Company over and across the East half (½) of the North West quarter (¼) of the South West Quarter (¼) of Section Twenty (20) in Township Two (2) North, Range Two (2) East of the third principal Meridian."

By warranty deed dated January 3, 1898, from *Caroline Rasler* to said Railroad Company (involved in claim of The Ohio Company—R. 68):

"A strip of ground for right of way for said Company Sixty feet (60) wide over and across the South East quarter (¼) of the North East quarter (¼) and the West half (½) of the North West quarter (¼) of the South West quarter (¼) and the South East quarter (¼) of the North West (¼) Quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the third principal Meridian, it being the strip of land over and across said above described tracts of land where the said railroad is now located."

In the court below, Kingwood Oil Company asserted claim to the strip of land conveyed by the Shanafelt deed (R. 3), but did not join in the appeal.

It seemed apparent that the contentions of the Magnolia Company and The Ohio Company would result in prolonged litigation, during which time the oil would be drained from under the right of way into nearby wells, thus resulting in a serious loss to the trust estate in the event Trustee's claim to title be upheld. Trustee therefore petitioned the bankruptcy court for an order permitting the oil to be removed from the right of way, the proceeds from the sale thereof, after defraying the expenses of drilling, conserving, and selling the oil, to be impounded as a trust fund for the account of whom concerned, pending final determination of the controversy.

Magnolia Petroleum Company and Ohio Oil Company entered their appearance, and the Bankruptcy Court, after hearing testimony respecting the probability of the oil being rapidly drained from under the right of way, found this to be a fact, and that it justified the immediate drilling of wells for the conservation of the oil (R. 53). The Court accordingly ordered that the proceeds of the oil so removed from the right of way be impounded; ordered other possible adverse claimants brought in by publication; and retained jurisdiction to hear further evidence and determine adverse claims to title (R. 54-56).

Magnolia Petroleum Company and Ohio Oil Company appealed from this *interlocutory decree* on the theory that the deeds upon which Trustee relied conveyed, by their granting clauses, a mere easement for railroad purposes, and that the Trustee therefore was in neither actual nor constructive possession of the underlying minerals.

The Court of Appeals sustained this contention and held that the Bankruptcy Court was without jurisdiction over the parties or subject matter of the litigation. The decree directed that they be dismissed for want of jurisdiction (R. 157).

Pending appeal from the interlocutory order, further proceedings, pursuant to the order of the bankruptcy court, were not stayed, and we go beyond the record to explain that as of September 1, 1939, thirteen oil wells had been drilled by petitioner on the right of way of Missouri-Illinois Railroad through the Salem oil field under the orders of the bankruptcy court here involved, and under similar orders respecting other segments not directly involved in this appeal. As of September 1, 1939, the money received from the sale of the oil and impounded in a special account awaiting directions of the Bankruptcy Court aggregated $472,000, of which, pursuant to orders of court, approxi-

mately $225,000 has been spent for drilling, producing and marketing the oil from these wells. We state these facts as a mere narrative of what has occurred since the appeal was taken.

In addition to the issues hereinbefore referred to, it was contended by the aforesaid oil companies in the lower court that Caroline Rusler was possessed of only a half interest in the land which she purported to convey to the Railroad Company by the deed hereinabove referred to, and petitioner in turn contended that any defect in this respect was cured by facts admitted in the Record (R. 135-6), which, according to petitioner's contention, gave him title by adverse possession pursuant to the provisions of *Chap.* 83, *Sec.* 6, *Revised Statutes of Illinois* 1939. Since the conclusion reached by the Court of Appeals did not make it necessary for it to pass upon this issue, we assume that this issue is not now properly before this court for consideration, and that if its determination becomes pertinent further proceedings on this particular issue will be had in the court below.

SPECIFICATION OF ERRORS.

I.

(a) The court erred in holding that an Illinois deed conveying to a railroad company *a strip of land for right of way* conveyed a mere easement, and erred in failing to hold that the language *"for right of way"* was merely descriptive of the intended use and not a limitation, restriction or condition respecting the duration or the use. The decision appealed from is in this respect in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in *Carter Oil Co. v. Welker,* decided November 6, 1939, and printed in the appendix of this brief. The decision under review is, in this respect, also in conflict with the authoritative Illinois decisions, and more particularly with such cases as *Weihe v. Lorenz,* 254 Ill. 195, 98 N. E. 268; *Tinker v. Forbes,* 136 Ill. 221, 26 N. E. 503; *Downen v. Rayburn,* 214 Ill. 342, 73 N. E. 634; *Noyes v. St. L. A. & T. H. R. R. Co.,* 21 N. E. 487, and *Supervisors of Warren County v. Patterson,* 56 Ill. 111.

(b) The court erred in construing the words *"over and across"* as referring to the words *"a strip of land,"* and erred in construing these words as indicating a reservation by the grantor of the subsurface rights, including oil, gas and other minerals, and in this respect the decision under review is in direct conflict with the interpretation of a similar conveyance by the Circuit Court of Appeals of the Fifth Circuit in *Kynerd v. Hulen,* 5 Fed. [2] 160, 162.

II.

The court erred in failing to hold that the bankruptcy court had jurisdiction, as a preliminary inquiry, to determine the question of possession on which its jurisdiction to determine the ultimate merits of the controversy de-

pended; and erred in holding that the action of the Bankruptcy Court in conserving the oil and impounding the proceeds, pending ultimate determination on appeal of the question of possession, was an abuse of discretion; and in this respect the decision is in conflict with such decisions of this court as *Trauble-Scott-Kitzmiller Co., Inc., v. Fox et al.*, 264 U. S. 426, 432.

ARGUMENT.

I.

In the light of the Illinois decisions, did these warranty deeds, which purported to convey "a strip of land for right of way of said Railroad Company over and across" a larger tract specifically described, convey a fee-simple title to the strip of land so described by its intended use for right-of-way purposes?

The District Court, sitting as a Court of Bankruptcy in the case at bar, upheld the fee-simple absolute title to the strip of land in question, and in doing so followed without written opinion the decision of the District Court for the Eastern District of Illinois handed down October 13, 1938, in *Carter Oil Co. v. Welker et al.*, 24 Fed. Supp. 753, involving a substantially similar question.

The deed in the Carter Oil Company case conveyed to the Railroad Company *"as and for its right of way a strip of land"* (24 Fed. Supp. 754), which is not to be distinguished from the conveyance in the case at bar of *"a strip of land for right of way"* (R. 3).

In the Carter Oil Co. case Judge Lindley, after an exhaustive analysis of the Illinois decisions, thus summarized his conclusions (24 Fed. Supp. 756):

> "The language of the conveyance before me includes, under the statutes of Illinois, all covenants of warranty and seizin included in a common-law deed of bargain and sale of certain specifically described land, with the additional words 'as and for its right-of-way.' This language is substantially the same as that of the court in Noyes v. St. Louis A. & T. H. R. Co., supra, where the words used were 'for a right-of-way,' and it was expressly stated that the land was to be used for general railroad purposes 'as

> may be necessary.' *It seems to me, therefore, the settled law in Illinois that a mere statement of the use to which it is expected the property will be devoted, is not sufficient to engraft upon the conveyance of the fee a condition, limitation or restriction.* The words here are not sufficiently apt, under the rule in Illinois, to create a limited grant." (Italics ours.)

Referring to Judge Lindley's decision in the Carter Oil Company case, Judge Thomas, speaking for the Circuit Court of Appeals in the Magnolia case here under review, said (106 Fed. [2] 227):

> "We are not unmindful that in construing a deed somewhat similar to the deeds involved in this case the District Court of Illinois, in *Carter Oil Company v. Welker*, 24 F. Supp. 753, reached the conclusion that the deed vested a fee simple title in the railroad company, and not an easement. While that decision commands great respect, in so far as it is inconsistent, if at all, with the views herein expressed, we are not inclined to follow it."

The *Carter Oil Co. case* referred to was affirmed, and the reasoning of Judge Lindley in that decision was followed by the Circuit Court of Appeals of the Seventh Circuit in the decision handed down November 6, 1939, hereinafter copied in the appendix of this brief.

The Court of Appeals for the Seventh Circuit, in referring to the decision of the Circuit Court of Appeals in the *Magnolia case* here sought to be reviewed, states:

> "The difficulty of the question is well illustrated by the fact that opposite conclusions were reached by the District Court in the case at bar (see *Carter Oil Co. v. Welker*, 24 F. Supp. 753) and the Court of Appeals for the Eighth Circuit in the *Magnolia case, supra*, both after very scholarly study of the issues

and the authorities upon precisely the same type of deed and both arising under the Illinois law. Since the opinions in both of those cases contain excellent analyses of the significant cases bearing on the subject as well as the applicable Illinois statutes, we deem it unnecessary to repeat that discussion here, and therefore refer to only a few of the cases.

"While the Illinois courts have not passed on the identical question involved, there are several cases to the effect that the recitation of the purpose of the conveyance does not limit the title conveyed. See *Supervisors v. Patterson*, 56 Ill. 111; *Tinker v. Forbes*, 136 Ill. 221; *Downen v. Rayburn*, 214 Ill. 342, all relied upon by the District Court. In these cases we find the conveyance of a lot or tract, 'for a courthouse and other county buildings,' 'also for the purpose of locating proper water wheel and races to draw water,' 'to be used as a church location,' all of which conveyances were held to transfer the fee simple interest, notwithstanding the recitation of purpose. The *Magnolia case* holds that these cases are not authority for the construction of the deed here involved for the reason that in those cases the question was whether a fee simple was conveyed or only a determinable fee, and that in such cases the courts do not look with favor upon conditions subsequent, hence will not construe words indicating purpose or use as restrictions. The situation is different, it holds, when the question is whether a fee is conveyed or only an easement, in which case words 'which, if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed.'

"We do not agree with this distinction."

* * * * * * *

"We conclude that, in the absence of a contrary decision by the Illinois courts, we prefer to follow the rule that a deed conveying a strip of land, even though the purpose be recited, is to be construed as conveying

> a fee simple interest in the grantee rather than an easement of use. We do not agree with appellant's contention that the words 'over and across' written in longhand in the deed limited the conveyance to an easement. We think the words 'over and across' refer only to the surveyed line by which the exact location of the land was to be determined. * * * Decree affirmed."

STATUTES AND APPLICABLE RULES OF CONSTRUCTION.

Among the powers granted to a Railroad Company by the laws of Illinois (*Ch.* 114, *Sec.* 20, *R. S.* 1939) are those—

> "To purchase, hold and use all such real estate and other property as may be necessary for the construction and use of its railroad, and the stations and other accommodations necessary to accomplish the object of its incorporation, and to convey the same when no longer required for the use of such railroad."

Discussing the right of a railroad to hold fee-simple title to its right of way in the State of Illinois, the Supreme Court of that state, in *Walker v. I. C. Railway Co.*, 215 Ill. 610, 74 N. E. 812, said:

> "There can be no question but that the Appellee, under its charter and the statute in force in this state at the time it received said deed, had the power to acquire a fee."

Section 9 of the *Illinois Conveyance Act* (*Ch.* 30, *Sec.* 8, R. S. 1939), which Act has been in effect since July 1, 1874, sets forth the form of warranty deed to be used in Illinois, and then follows the language:

> "Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a

conveyance in fee simple, to the grantee, his heirs or assigns."

The deeds in question followed this statutory form.

Words of inheritance are not necessary in Illinois by reason of the provisions of *Section* 13 of the *Conveyance Act* (*Ch.* 30, *Sec.* 12, *R. S.* 1939), which provides as follows:

> "Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law."

It is the contention of opposing counsel that this statute last above quoted has to do merely with the *duration* and not with the *use* of the estate conveyed. The answer to this contention is here of no consequence, for entirely apart from the foregoing statute it is now the settled law in Illinois that with respect to *use* as well as *duration* of the estate, all reasonable doubts are to be resolved against conditions, limitations and restrictions, and are to be resolved in favor of the grantee as against the grantor.

In *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364, the court, citing and following precedents there set out, said:

> "It is also well settled that 'in the construction of deeds containing restrictions and prohibitions as to the *use* of the property by the grantee, all doubts should, as a general rule, be resolved in favor of the free use of the property, as against restrictions.'"

In *Williams v. Swango*, 365 Ill. 549, 7 N. E. (2) 306, the court said:

> "Where words are used in an instrument which

may be understood in one way by some and in another way by others, so that a doubt of their intended meaning arises, such doubt must be resolved in favor of the grantee and against the grantor."

From the foregoing statutes and decisions the following conclusions are undisputed:

A railroad company may, by conveyance in Illinois, acquire fee-simple absolute title to a strip of land for its right of way.

The conveyance of "*a right of way*" as distinguished from "*a strip of land for right of way*" does not pass fee-simple absolute title, but only an easement for railroad purposes.

If the use or the duration of the conveyance does not clearly appear from the four corners of the deed, all doubts must be resolved against limitations of use or duration and in favor of an absolute fee-simple title.

THREE POSSIBLE CONSTRUCTIONS.

There are three possible constructions of the deeds in question which purport to convey "*a strip of land for right of way,*" to wit:

(a) The language may be construed as conveying fee-simple absolute title, the words "for right of way" being merely descriptive of the use and not a limitation of either the duration or the use.

(b) The language may be interpreted as passing a base, qualified or determinable fee—in other words, a fee that terminates upon discontinuance of the use for railroad right of way.

(c) The language, according to the contention of respondents, may convey a mere easement or right to use

the land exclusively for a right of way, the fee remaining in the grantor.

We shall consider these in the order mentioned.

CONSTRUING THE CONVEYANCE AS A FEE-SIMPLE ABSOLUTE.

Petitioner most earnestly contends that under the authoritative Illinois decisions the language *"for right of way"* following the language *"a strip of land"* is merely descriptive of the use and not a limitation or condition, and that the deeds in question therefore passed fee-simple absolute title to the strip of land in question.

In expressing its ultimate conclusion on this issue the Court of Appeals in its opinion says (106 F. [2] 225):

> "An examination of the deeds under consideration, *with the Illinois law and rules of construction in mind,* is, we think, convincing that in each of them the clear intent, expressly stated, was to convey to the Railroad Company only a right-of-way easement for its railroad, and not a fee."

The fallacy of this conclusion is that the Court of Appeals did not keep *"the Illinois law and rules of construction in mind,"* or at least did not apply these rules or give them the weight that is required by the decisions of this Court with respect to matters where the state decisions are controlling. Under the authoritative Illinois decisions it is well settled that in the construction of deeds all doubt should be resolved in favor of the grantee and in favor of the free use of the property as against conditions, restrictions and limitations. Following these principles the Supreme Court of Illinois, as admitted in the opinion under consideration (106 F. [2] 225) has held that the descriptive phrases hereinafter referred to are not limitations or conditions imposed upon the fee, to wit:

(a) Conveyance of a strip 10 feet wide *"for alley purposes"* (*Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268).

(b) The granting of a lot *"for the purpose of locating a proper water wheel and races to draw said water"* (*Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503).

(c) Conveyance of a certain tract or parcel of land *"to be used as a church location"* (*Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364).

(d) Conveyance of a tract of land to a railroad company *"for the erection and maintenance thereon of the freight house of said companies, or either of them, together with said tracks, turn-outs, switches, fixtures, and buildings, and for such other general railroad purposes as may be necessary and convenient for said company"* (*Noyes v. St. L., A. & T. H. R. R. Co.*, 21 N. E. 487).

We shall analyze these and other applicable Illinois decisions in some detail.

In *Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268, conveyance was of a definite tract of land, together with ten feet adjoining on the south of said tract for alley purposes. The language of the conveyance in question from Huegely to Altmansberger was:

> "I also give ten feet wide adjoining on the south of this tract, or the strip between this tract and the alley I gave in my deed of September 3, 1881, to John Lorenz, for alley purposes."

Discussing this, the court said:

> "The deed conveyed the fee to Altmansberger. Even if the words 'for alley purposes' refer to the conveyance to Altmansberger and not to that of Lorenz, they do not limit the estate granted."

In the case just cited, the deed conveyed a strip of

ground ten feet wide *"for alley purposes."* In the case at bar, the deeds conveyed a strip of ground sixty feet wide *for right-of-way purposes.* If the language *"for alley purposes"* in the case referred to did not limit the estate granted, then the words *"for right of way"* in the case at bar do not limit the estate granted. If this language does not limit the estate granted, then, obviously, the estate granted is an unrestricted fee-simple title to the strip of land in question.

In *Tinker v. Forbes,* 136 Ill. 221, 26 N. E. 503, the court had under consideration a deed which granted the east half of Lot 9 *"for the purpose of locating a proper water wheel and races to draw said water."* In holding that this description of the intended use of the lot so conveyed did not amount to a condition or covenant the court said (26 N. E. 506 l. c.):

> "That deed granted a certain interest in the grantor's water-power on Rock river, and also conveyed to the grantees lots 12 and 13 in the west block of the grantor's lots, 'and also, for the purpose of locating proper water wheel and races to draw said water, the east half of lot 9 in the south block,' etc. It cannot be doubted that the effect of this deed was to convey to the grantees the fee in said half lot. By reference to the operative words of the deed it will be seen that by it the grantor granted, bargained, sold, and conveyed, for the purpose above indicated, the south half of said lot 9, the title or interest, thus sought to be conveyed being, not an easement or servitude, but the lot itself. *What effect, then, is to be given to the words, 'for the purpose of locating proper water wheel and races to draw said water'? It is plain that they do not constitute a condition, as there is no provision for re-entry for condition broken, nor is there anything in the instrument indicating an intention on the part of the grantor that the appropriation of said premises to any other purpose should have the effect*

of defeating the estate granted. Nor can said language be construed as a covenant on the part of the grantees to use the property granted for the purpose indicated, and none other. No terms are used by which a covenant is ordinarily expressed, nor are there any negative words forbidding the appropriation of the property to other purposes." (Italics ours.)

In *Downen v. Rayburn,* 214 Ill. 342, 73 N. E. 634, which is representative of the cases cited, the Court had under consideration a warranty deed from Downen and wife to certain church trustees conveying

"A certain tract of land *to be used as a church location,* situated * * *."

The rules of interpretation applicable to this language would seem equally applicable to the conveyance of

"A certain tract or parcel of land *to be used as a railroad right of way,* situated * * *."

Quoting from the Illinois decision last referred to:

"It is well settled that where real property is conveyed in fee restrictions in the use are not favored, although courts will enforce such restrictions where the intention of the parties is clear in the creation of restrictions or limitations upon the use of a grant. It is also well settled that 'in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee *all doubts should, as a general rule, be resolved in favor of a free use of property, and against restrictions.*' * * * It will be noticed that the words in question, 'to be used as a church location,' stand alone, and that the words 'upon condition' are not used in connection therewith. That is to say, it is not stated in the deed that the premises are conveyed upon condition that they are to be used as a church location. Nor is there any

provision in the deed for re-entry by the grantor in case of a breach of the covenant, if it be a covenant, that the premises are to used as a church location. * * *

"Here the words in question, 'to be used as a church location,' are merely declaratory of 'the purpose of the conveyance.' It cannot be said, therefore, that they render the estate conditional."

In *Noyes v. St. Louis A. & T. H. R. R. Co.*, 21 N. E. 487, the Supreme Court of Illinois had under consideration a deed granting to the Railroad Company a strip of land 4,000 feet long and 350 feet wide. Following the granting clause, the deed recited:

"The above tract is granted to said companies for the erection and maintenance thereon of the freight-house of said companies, or either of them, together with side tracks, turn-outs, switches, fixtures, and buildings, and for such other general railroad purposes as may be necessary and convenient for said company."

Referring to this language the court said:—

"If there are any conditions subsequent imposed by this deed, they must arise by implication from the use of the words 'showing the purpose and object of the grant' * * *.

"It is to be observed that the clause quoted does not require, either expressly or by necessary implication, that the company shall or must do anything. No condition is attached to their failure to do any act at any time. The language employed would indicate, rather, the use to which the land may be devoted. The land is conveyed to them for the purposes set forth in the deed. * * *

"As we have seen, the courts are not inclined to so construe the contract of parties as to make estates liable to be defeated by conditions subsequent, and, even if such an estate is created, the court will not

> defeat it except for a substantial failure to perform the condition. 'In the same spirit, and in the same line of policy, courts construe a clause in a deed to be a covenant, rather than as a condition subsequent . . . . We are not inclined to hold that the deed vested the title in the grantees upon condition to be subsequently performed."

In *Supervisors of Warren County v. Patterson*, 56 Ill. 111, by contract and by subsequent deed executed pursuant thereto, one party "agrees to sell to said party of the second part" certain described property "*for courthouse and other county buildings.*" In the course of its opinion the court said:

> "If A buys a lot of ground of B, and it is declared in the deed that he purchases it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention. But if a grant be made by A to B, *on condition* B erects on the land granted a certain structure, and he fails so to do, the land might revert to the grantor."

The court in the case cited commented that the deed conveyed the absolute fee, and that the statement of the intended use was not sufficient to constitute a conditional grant. By analogy, the conveyance of a strip of land for right-of-way purposes does not by such designated intention of the use limit the fee to the strip of land so conveyed.

The above cases have been consistently followed by the Supreme Court of Illinois in *Chicago Daily News v. Kohler*, 360 Ill. 351, 196 N. E. 445, and finally in *Rockford Trust Co. v. Moon*, 370 Ill. 250, 18 N. E. [2] 447, wherein the court said:

> "Even where the deed contains words stating the

consideration for or the purpose of the conveyance, they do not, of themselves, render an estate conditional. *Downen v. Rayburn,* 214 Ill. 342, and cases there cited."

If the decision of the Court of Appeals below is correct, then it would follow as a logical corollary that the Supreme Court of Illinois should have held that conveyance of a ten-foot strip *"for alley purposes"* conveyed merely an easement for alley purposes, and should have held that the conveyance of a parcel of land *"to be used as a church location"* conveyed a mere easement for this particular purpose, reserving all other rights in the original grantors. But the Supreme Court of Illinois in these and other analogous instances refused to so hold. It must therefore be assumed that following these precedents the Supreme Court of Illinois, to be consistent, would now hold that the conveyance of a *"strip of land for railroad right of way"* is not a conveyance of a mere easement. In the case at bar the Court of Appeals, we respectfully submit, erred in failing to follow these Illinois authorities to their logical conclusion.

Construing the Conveyance as a Base or Determinable Fee.

If the language *"for right of way"* be construed as a condition or limitation, then the conveyance would not necessarily be an easement, but rather a base, qualified or determinable fee. Discussing such a base or determinable fee in *McIntyre v. Dietrich,* 294 Ill. 126, 128 N. E. 321, 322, the court said:

> "A base or determinable fee is such a fee as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. It is a fee for the reason that it may last

forever if the contingency does not happen, but it is debased because its duration depends upon collateral circumstances which qualify or debase it."

This court, in passing upon a similar question in *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, said:

"The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, *but a limited fee*, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

This same language was quoted with approval in *Kern River Co. v. United States*, 257 U. S. 147, 151.

This court, in *Western Union v. Penn. R. Co.*, 195 U. S. 540, 570, said:

"A railroad right of way is a very substantial thing. *It is more than a mere right of passage.* It is more than an easement. * * * A railroad right of way has therefore the substantiality of the fee, and is private property, even to the public, in all else but the interest and benefit in its uses."

In *Chicago & Mississippi River R. R. Co. v. Patchin*, 16 Ill. 198, 202, the Court said:

"I presume the right to the land upon which railroads are built is not strictly analogous to the easement of the public in a highway, leaving the fee in the owner of the soil, but is an absolute ownership in the fee *for railroad purposes.*"

If the conveyance be considered as a base or determinable fee, then the fee in the land passed to the Railroad Company with a mere *possibility of reverter* upon

termination of the use for railroad purposes. Such a situation was before the court in *Dees v. Cheuvronts*, 240 Ill. 486, 88 N. E. 1011. In that case the land was conveyed to school trustees "so long as it shall be used as a schoolhouse site." The Supreme Court of Illinois held that the school trustees, rather than the grantor with mere possibility of reverter, was entitled to drill for the oil underlying the property. This case still stands as the law in Illinois, and applying it to the facts at bar, the Railroad Company's Trustee would be entitled to the oil underlying the right of way, even though it be conceded that the language "for right of way" constituted a limitation of the fee.

CONSTRUING THE CONVEYANCE AS AN EASEMENT.

Under the Illinois law a conveyance of a mere *right of way*, as distinguished from *a strip of land for right of way*, conveys the mere *use* of the land. The conveyance of *a right of way* is the conveyance of an easement, whereas the conveyance of *a strip of land, to be used exclusively for right-of-way purposes*, is a base or determinable fee with possibility of reverter. We have found no Illinois decision to the effect that the conveyance of the fee subject to its use exclusively for railroad right of way conveys a mere *use* of the land. On the other hand, the Illinois decisions uniformly hold that the conveyance of a mere *right of way* does not convey the fee at all, but merely the *use*. Quite obviously, therefore, the cases dealing with deeds which purport to convey a mere *right of way* or *use* are not applicable to the deeds in question. It is upon the Illinois decisions of this kind that opposing counsel rely. A brief analysis of these cases will readily distinguish them from the facts at bar.

In *I. C. R. R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. 301, the conveyance was

"For the purpose of constructing, maintaining, and operating thereon a single or double track railroad, with all its necessary appurtenances and for all uses and purposes connected with the construction, repair, maintenance, and complete operation of said railroad, *the right of way* over and through said tract * * *." (Italics ours.)

As will be noted from the foregoing quotation, the granting clause of the deed referred to conveyed a mere "*right of way*," and was therefore held to convey an easement.

In *I. C. R. R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563, the court had under consideration another conveyance to the Illinois Central on the same form and in exactly the same language as the conveyance last above quoted, and it was admitted in the stipulation of facts that it conveyed a mere easement.

In *Walker v. I. C. R. R. Co.*, 215 Ill. 610, 74 N. E. 812, the conveyance was on the same form and in exactly the same language as that above quoted from the *Houghton case*. The conveyance was of *a right of way* and not a strip of land for use as a right of way.

In the *Walker case* the court, apropos of our contention, said:

"The general rule is that words following the granting clause of a deed which state the use to which the property granted is to be put, are not restrictions or limitations upon its use unless it is specifically so stated to be in the deed."

In *Branch v. Central Trust Co.*, 320 Ill. 432, 151 N. E. 284, the conveyance was:

"A railroad right of way and depot grounds over and upon the whole of Lot A * * *."

Lot A referred to was a narrow strip of ground extending through the half quarter section about sixty-six feet in width except at the east end, where it was 160 feet wide. The court in construing the foregoing granting clause said:

> "The grant to a railroad company of *a right of way* over, through, and upon land described does not convey the fee to any part of the land described, but only the right to use the land for railroad right-of-way purposes." (Italics ours.)

After referring at length to the decision of other states, the court said:

> "The grant is of *the railroad right of way and depot grounds,* to have and to hold unto the grantee for as long as the same shall be used for railroad right of way and depot grounds. Upon the abandonment of the use of the right of way for a railroad right of way and depot grounds, the interest of the railroad company terminated." (Italics ours.)

In *Joseph v. Evans,* 338 Ill. 11, 170 N. E. 10, plaintiff offered verbal testimony in support of an alleged agreement to execute a deed. The evidence merely tended to show that a "*right of way*" was to be conveyed. The railroad had been abandoned, and if only a right of way was to have been conveyed, this right was lost by abandonment. The court said:

> "The law in this state is well settled that a *grant of a right of way* to a railroad company does not convey a fee in the land, but conveys an easement only." (Italics ours.)

In *Wiggins Ferry Co. v. O. & M. Ry. Co.,* 94 Ill. 83-92, the Ferry Company purported by the language of the deed to give, grant, and convey to the Railway Company

> "The right to construct, maintain and use, in, through,

upon and over the piece or parcel of ground hereinafter described, all such railroad tracks, depots, warehouses, and other buildings and erections as the said party of the second part shall find to be necessary or convenient to be constructed, maintained or used for the purpose of transacting the business of the said party of the second part. * * *"

It was held that the instrument clearly conveyed no land, but merely a right to the use which would be terminated when its use for the purpose ceased.

In *Carter Oil Co. v. Welker*, 24 Fed. Supp. 753, 757, Judge Lindley, after analyzing the foregoing six cases on which opposing counsel rely, said:

"In each of these cases the language used by the parties was such that the court found as a necessary implication an intention to convey a limited and restricted right in spite of the general rule in Illinois that limitations are not favored. * * *

"Proper constructon of each of these cases does not indicate any conflict in principle between them and the cases relied upon in support of my conclusions. They indicate rather an adherence to those principles and the existence in Illinois of the rules herein previously announced, namely; that in the absence of words necessarily forcing a conclusion that a limited fee is intended, a fee-simple title passes."

But even if the conveyances in question be considered as mere easements, such "incorporeal and intangible rights in or growing out of land have applied to them the same idea of duration or quantity of estate that is applied to corporeal hereditaments."

Oswold v. Wolf, 129 Ill. 542, 19 N. E. 28, 30;
Wiggins-Ferry Co. v. Ohio & M. Ry. Co., 94 Ill. 83;
C. C. C. & St. L. Ry. Co. v. Munsell, 94 Ill. App. 10, 12.

In *Walker v. Illinois Central*, 215 Ill. 610, 74 N. E. 812, 814, the court had under consideration a deed which conveyed a mere right of way, and while holding this to be an easement, the court said:

> "The general rule is that words following the granting clause of a deed, which state the use to which the property granted is to be put, are not restrictions or limitations upon its use, unless it is specifically so stated to be in the deed. *Board of Supervisors of Warren County v. Patterson*, 56 Ill. 111; *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364. The rule above announced is usually held to apply only where a fee has been conveyed. *Still, in a case like this, where the use of the strip has been conveyed for railroad right of way purposes, and its exclusive possession is necessarily to be vested in the railroad company to fulfill the object of the grant so long as it shall be used for railroad right of way purposes, we are of the opinion no reason exists why such rule should not be applied to such conveyance.*"

This statement last above quoted is opposed to the conclusions of the Circuit Court of Appeals in the case at bar. In fact, the Supreme Court of Illinois in the Walker case just cited has gone even further than is necessary in the case at bar, and has held that where the conveyance is admittedly a mere right-of-way easement, the court will nevertheless apply the same rules of construction to such an appurtenant easement as would be applicable to the conveyance of any interest in land.

Conclusions to Be Drawn From the Foregoing.

In the case at bar the question at issue is really not what rules of construction are applicable to railroad easements, but rather what rules of construction are applicable to a deed in statutory form which purports to con-

vey either the fee-simple absolute title or else a base fee with possibility of reverter. In determining whether the deeds in question convey a fee-simple absolute or a fee subject to limitations as to duration and use, we must first turn to the authoritative Illinois decisions to decide whether the language is considered sufficiently ambiguous to justify application of rules of construction, and, finding this to be true, we must then apply the authoritative Illinois decisions to which we have referred, resolving the doubt in favor of the grantee and in favor of the fee-simple absolute conveyance. There is nothing in any of the decisions cited to the effect that the conveyance of the *fee*, even if specifically restricted to *use for right of way only*, would convey a mere *easement* or *right of use* as distinguished from a limited fee.

It may be true, as stated in *Waller v. Hilderbrecht*, 295 Ill. 116, 128 N. E. 807, 809, that,

> "Generally speaking, where a particular or special right of easement in land is conveyed, which may well coexist and be enjoined and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed."

In the case referred to, this language was used in connection with an easement in gross—one that was not even appurtenant to real estate.

In the deeds conveying *mere rights of way*, on which opposing counsel rely, the court repeatedly has stated that the fee remains in the grantor. Analyzing the deeds in the case at bar in the light of the Illinois decisions and the provisions of the *Illinois Conveyance Act*, it is difficult to understand how warranty deeds in statutory form purporting to convey a strip of land can be considered as reserving the fee in the grantor, even though the words

"for right of way" be held to limit the duration or use for railroad purposes, thereby making the fee a base or determinable fee with possibility of reverter.

If the principle announced in the foregoing quotation from *Waller v. Hilderbrecht* has any application at all to the facts at bar (which we deny), it can be invoked only after first establishing that the conveyance would otherwise be a base fee conditioned on use for railroad right of way, and then reasoning that since an easement will accomplish the same purpose as such a base fee, the conveyance should, in the light of the above quotation, be treated as an easement. This reasoning presupposes that the conveyance would otherwise be a fee limited to use for railroad right of way—it starts with this supposition as a premise. But what about the first step in the chain of reasoning—the step by which it is to be determined that the conveyance is not a fee-simple absolute, but rather a conditional or base fee for which the easement theory is then to be substituted? The cases above cited, such as *Downen v. Rayburn*, dealing with a tract of land "*to be used as a church location*," and *Weihe v. Lorenz*, dealing with a strip of land "*for alley purposes*" block any such contention. Unless they can be reasoned away, the conveyance never gets to the stage of being a limited fee, but remains a fee absolute, and therefore it cannot be reasoned that the conveyance is an easement, because an easement will certainly not serve the same purpose as a fee absolute.

To invoke the principle announced in the quotation *supra* from *Waller v. Hilderbrecht*, if applicable at all, respondents must first establish that, in the conveyance of "a strip of land for right of way," the words "for right of way" constitute a limitation of the fee, both as to use and duration, rather than a mere description of the intended

use. Such a showing cannot be made in the face of the decisions cited on page 16 *et seq.* of this brief.

As forecast above, however, we do not concede that an easement affords substantially the same right as would be accorded by a base fee conditioned on use for railroad right of way, if for no other reason than because this latter conveyance would give grantee the oil and mineral rights pending the contingency upon which possibility of reverter depends, while an easement would accord the mere right of limited use without the right of profit from the minerals.

Much was said below about the injustice of retaining title to strips or gores across farm lands after use for railroad purposes has ceased. The grantor in this respect would have the same right of reverter in the case of a base fee as he would have in the case of an easement. In either event, he would have title when use for railroad right of way ceased, so as between base fees and easements this question of alleged public policy is not a factor.

Conveyances reserving a passage or right of way are to be distinguished from the facts at bar in applying the Illinois rules of construction. For example, if A conveys to B a strip of land for an alley, the presumption is in favor of the grantee and in favor of the unrestricted use. On the other hand, if A conveys to B a city lot with reservation of a strip of said land for an alley, the presumptions are still in favor of B as grantee and in favor of the fee-absolute construction of the conveyance to B. Quite obviously the same principles of construction will work opposite results, depending upon whether the strip for an alley is conveyed or whether it is reserved from a larger tract so conveyed.

Illustrative of this class of cases is *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482, cited by opposing counsel in the court below, involving a reservation of "a strip 2 rods wide off the northwest side of said premises for a street." Quoting

from the Minnesota decision on which the Illinois court relied:

> "* * * and, upon the principle that the grantor's deed is to be taken most strongly against himself, no such exclusion of the fee is to be implied."

A different rule is applied to an *exception* of a strip of land from the conveyance as distinguished from a *reservation* of the strip for a right of way (*Dickman v. Madison County L. & P. Co.*, 304 Ill. 470, 136 N. E. 790, 794).

Since the law of Illinois relating to construction of deeds is controlling, we have for the most part confined the foregoing discussion to the Illinois decisions. The decisions of other states are conflicting and are frequently prompted by statutory provisions. This is particularly true in Kansas. In Missouri the earlier decisions to the effect that the carrier could not acquire the fee in its right of way have been overruled in the case of *Coates & Hopkins Realty Co. v. Kansas City Terminal*, 328 Mo. 1118, 43 S. W. [2] 817, 823.

Use of the Words "Over and Across"

In each of the deeds under consideration appear the words "*over and across*," with respect to which language the Court of Appeals in its decision under review says (106 Fed. [2] 224-5):

> "Counsel for appellee argue that the words 'over and across,' as used in the deeds, are descriptive of the words 'right of way,' and the words 'right of way' are descriptive of location by reference to the intended use of the 'strip of ground' to be conveyed. In this we think they err. The words 'over and across' are descriptive of the location of the 'strip of ground,' and the words 'for right of way' describe the use or easement, that is, the estate intended to be conveyed. No

other view can be reconciled with the language of the Rusler deed where there is added to the description the words, 'it being the strip of land over and across said above described tracts of land where the said Railroad is now located.' The Rusler deed was executed in 1898 and the other two in 1896. Apparently the railroad had not been located when the earlier deeds were made, but we perceive no sound reason why they should be construed differently."

In the *Young* deed (R. 3) involved in claim of Magnolia Company (R. 58) appears *"a strip of land for right of way for said Railroad Company 60 ft. wide over and across the Southwest Quarter. * * *"*

In the *Bower* deed (R. 3) involved in the claim of the Ohio Company (R. 68) appears *"a strip of ground sixty-six (66) feet wide for right of way of said Railroad Company over and across the East Half * * *."*

In the *Rusler* deed (R. 3) involved in claim of the Ohio Company (R. 68) appears *"a strip of ground for right of way of said company sixty (60) feet wide over and across the Southeast Quarter * * *, it being the strip of land over and across said above described tracts of land where the said railroad is now located."*

Analyzing the foregoing phrases from the Young and the Bower deeds, and the first clause in the Rusler deed, an ambiguity is obviously apparent. Do the words *"over and across"* modify *"a strip of land,"* or do they modify the words *"right of way"*? Either interpretation might be justified from a literal construction of the language.

Under the circumstances, if one interpretation results in limiting the fee and the other does not, then under the established rules of construction prevailing in Illinois and heretofore discussed in this brief, we must adopt the interpretation most favorable to the grantee and must

avoid the construction that will limit the fee-simple absolute title.

Judge Thomas, speaking for the Court of Appeals in the case at bar, predicates his conclusion above quoted solely upon the following additional phrase appearing exclusively in the Rüsler deed, to-wit:

> "* * * it being the strip of land over and across said above-described tracts of land where the said railroad is now located."

The Court of Appeals in the opinion under review apparently reasons that the strip of land referred to is over something, and that it was therefore not the intention to convey the subsoil and mineral rights. If this be the conclusion the Court of Appeals has sought to convey, then it is in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Kynerd v. Hulen*, 5 Fed. [2] 160, 162, wherein the Court said:

> "Plaintiff's whole case is built upon the use of the one word 'over.' It is argued that the use of that word demonstrates that there was something 'under' which was not being conveyed, and which later turned out to be oil. In our opinion, 'over' is synonymous with 'through' and 'through and over' conveys no meaning different from what would have been expressed if the words 'and over' had been left out."

A like question was before the Supreme Court of Texas in *Brightwell v. I. & G. N. Ry. Co.*, 49 S. W. [2] 437, 440, from which opinion we quote:

> "Counsel for Brightwell et al. earnestly insist that because this deed uses the word '*over*' in describing the thing conveyed, an intent is evidenced to convey only an easement. In other words, it is contended that the title *to* land is not conveyed, but merely a right *over* land. We think this contention should be overruled. The identical word is used in

> the deed construed in the Calcasieu Case. That deed says: 'Have granted * * * and by these presents do grant, bargain * * * to Houston and Texas Central Railroad Company, a strip of two hundred feet of land over the tracts of land,' etc. As before shown, the deed was held to convey the fee. The word *'over'* may sometimes mean *'above,'* and in other instances it may mean the *outside of*, but in this instance it clearly means from one side or extremity of grantor's land to the other."

Again bearing in mind that the doubt must be resolved in favor of the grantee and in favor of the unrestricted fee, it seems apparent that the lower court's interpretation of the last above quoted phrase from the Rusler deed is unwarranted.

In any event, this language peculiar to the Rusler deed could not have any bearing upon the interpretation of the Young and Bower deeds which were executed about two years before the Rusler deed and contained no such language as is found in this last phrase of the Rusler deed upon which the Court of Appeals predicates its conclusions.

II.

Even if it be ultimately held that Debtor's Trustee has a mere easement for railroad purposes, and that he had neither actual nor constructive possession of the oil underlying the right of way, yet the Bankruptcy Court had jurisdiction to determine the question of possession, and pending the determination, had jurisdiction to conserve the oil, permitting the cost thereof to be paid out of the proceeds of the sale, and holding the remainder of the proceeds for the account of whom concerned. The action of the court in this respect was not an abuse of discretion.

The Court of Appeals, disposing of this issue, said (106 Fed. [2] 228):

"Counsel for appellee in their briefs argue that even conceding that the court was without jurisdiction to determine title to the mineral and oil rights because the trustee was not in actual or constructive possession, that part of the order appointing a receiver *pendente lite* with authority to take possession, drill wells and extract and sell the oil was not an abuse of discretion. It cannot be said that the appointment of a receiver under such circumstances is not erroneous, nor that if he takes possession from the owner under such a void appointment that his act is not wrongful. * * * We hold that the petition on its face showed that the petitioner was not in possession, actual or constructive, of the mineral, oil and gas rights underlying the railroad right of way over and across the three tracts of land described in the deeds relied upon; that, consequently, the court was without jurisdiction to make the order appealed from; and that the order was wholly void."

The jurisdiction of the bankruptcy court with respect to a controversy of this nature is thus stated by this court in *Central Republic Bank & Trust Co. v. Caldwell*, 58 Fed. (2) 721, 730:

"First, the bankruptcy court always has jurisdiction, as a preliminary inquiry, to determine its own jurisdiction to proceed to examine and decide, in a summary proceeding, the merits of an adverse claim; second, the bankruptcy court has jurisdiction to examine and decide adverse claims if it has possession of the disputed property."

In *Taubel-Scott-Kitzmiller Co., Inc., v. Fox et al., Trustees*, 264 U. S. 426, 432, the Supreme Court said:

"As every court must have power to determine in the first instance whether it has jurisdiction to proceed, the bankruptcy court, has in every case, jurisdiction to determine whether it has possession, actual

or constructive. It may conclude, where if lacks actual possession, that the physical possession held by some other person is of such a nature that the property is constructively within the possession of the court."

If this court holds that Trustee has the fee simple title to the strip of land on which the right of way in question is located, then this present discussion in subdivision "II" of this brief becomes a moot question. If, however, this court decides that Trustee's title is but an easement, and that Trustee is therefore not in actual or constructive possession of the oil underlying the right of way, then we must not lose sight of the fact that the court nevertheless had jurisdiction to determine Trustee's possession and had jurisdiction to make appropriate orders to conserve the estate pending an appeal from its order upholding its jurisdiction.

The court below specifically found (R. 53):

"(b) That immediate action is necessary to conserve the oil supply underlying said property for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court;

"(c) That this Court has authority to direct that the expenses thereof be borne, in so far as possible, out of the proceeds of the oil so received."

There is ample evidence in the record justifying this finding that immediate action was necessary to conserve the oil supply and prevent its dissipation through adjacent wells pending the litigation. No assignment of error was urged against this ruling of the court. We therefore start with the premise that failure to have authorized the drilling of the wells on the right of way would have resulted in much of the oil being drained from under the right of way, to the great prejudice of the trust estate in the event

Trustee's claim to title be upheld. We respectfully submit that the technical jurisdiction of the court pending determination of possession was sufficient to legally justify the interlocutory order in question, and that the execution of such an order for the conservation of the estate was the exercise of sound discretion, and is not reviewable under any of the assignments of error set forth in Appellee's brief.

We naturally turn to the State of Texas, which is a large oil producing territory, for applicable decisions.

In *Malone v. Barnett*, 87 S. W. (2) 523, the *Civil Court of Appeals of Texas*, in a decision handed down October 30, 1935, appointed a receiver to remove and market the oil to which adverse claims were being asserted. Quoting from the opinion:

> "It seems now to be the settled law of this state that a receiver may be appointed by a court of competent jurisdiction upon the application of a joint owner of an oil and gas leasehold estate covering oil-producing land and thereby prevent drainage which may result when the joint owners are unable to agree upon a plan of development or operation of such lease. * * * The contention is made by appellants that no facts are alleged showing the immediate necessity of the appointment of a receiver without notice to them. There are allegations in the petition that the oil under the land involved is being constantly drained by wells on two sides of the tract of land involved, and that such drainage will create drainage ditches or feeders to said wells on adjoining leases and thus materially damage the leasehold estate of plaintiff's and defendants' tract of land. These allegations, it is believed, are sufficient to justify the court in making the appointment of a receiver without notice to appellants."

Exhaustive discussions of this question will be found in *Chancellor v. Guerra*, 85 S. W. (2) 663 (Texas); *United North & South Oil Co. v. Meredith*, 258 S. W. 550 (Texas); *Ohio Fuel Oil Co. v. Burdett*, 72 W. Va. 803, 79 S. E. 667 (W. Va.).

In *State of Oklahoma v. State of Texas*, 252 U. S. 372, a proceeding was filed in the Supreme Court of the United States which involved oil rights underlying the Red River. The United States intervened and requested the appointment of a receiver. The order of the Supreme Court directing the Receiver is set out in 253 U. S. 465, from which we quote:

> "The Receiver is hereby further authorized and directed to drill in the river-bed area described in paragraph 3 hereof, and bring into production whatever new wells he may be advised by his geologist and other experts are necessary for the conservation and development of the river-bed lands as a whole, pay the cost thereof out of the funds in his hands derived from the production of the wells in said river-bed area, keep separate accounts of the costs of drilling and operating and of the proceeds of the production of each well, and make a full report thereof, with his recommendations for the equitable allocation and distribution of such costs and proceeds, as soon after the court reconvenes in October next as may be practicable.
>
> "In addition to the specific powers herein contained, the Receiver, until the further order of this court, is hereby given whatever additional administrative powers may be found to be necessary to properly protect, operate, manage and develop the property within the receivership area and the oil and gas deposits therein."

In *Irving Trust Co. v. Wieser Products Corporation*, 71 Fed. (2) 681 (C. C. A. 2), the receiver of the bankrupt

moved the District Court to compel an affiliated company to turn over the assets in its possession, which he claimed in behalf of the trust estate. The judge heard the application upon the receiver's petition, supported by affidavit of an accountant and an answering affidavit, and directed the respondent to turn over the property to the receiver. This was reversed upon appeal, but the appellate court held that, pending determination of the jurisdictional question by the lower court and pending appeal, it was proper for the court "to impound the property so as to secure it, should the case go against the respondent in the end. That was a preliminary remedy like an injunction, quite independent of the final disposition."

Oil is of a wandering and vagrant nature; likely to be lost pending the litigation unless drawn to the surface.

Quoting from *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46, 48:

> "Oil and gas are classed as minerals, and that term is not confined to metallic substances, *but, on account of the wandering and vagrant nature of oil and gas and their liability to escape or to be withdrawn to other lands*, they are not subject to absolute ownership. They belong to the owner of the land under which they are located so long as they remain there, but when they escape and go under other land the title of the former owner is lost. The grant of oil and gas is a grant of such oil and gas as the grantee may find, and he is not vested with any estate in the oil or gas until it is actually found." (Italics ours.)

In the light of the foregoing decisions, we respectfully submit that even though the challenge to Trustee's possession of the oil rights underlying the right of way be sustained, the fact remains that the lower court had jurisdiction, pending determination of this issue respecting possession, to enter an appropriate order conserving the

subject matter of the litigation. The interlocutory order appealed from was not an abuse of discretion in this respect and, therefore, should not be disturbed. Under this ruling, the proceeds from the sale of the oil which the Trustee has removed from the right of way would first be applied toward the expense of drilling the wells and conserving and selling the oil, and the balance, if any, would be turned over by Trustee to the party whose title is sustained. If Appellants are entitled to the oil and the proceeds from the sale of their oil has been used to defray the cost of drilling, it goes without saying that they should be permitted to continue to use any wells on the right of way that have been paid for out of the proceeds of their oil. We are confident that the lower court will protect their rights in this respect.

CONCLUSION.

In the light of the Illinois decisions which are here controlling, we most earnestly urge this court to hold that the warranty deeds in question, which purported to convey "a strip of ground for right of way of said Railroad Company over and across" the larger tract specifically described, conveyed the fee simple absolute title to the strip so described by its intended use for right-of-way purposes.

If this court, however, should reach a different conclusion, then we urge that the jurisdiction of the lower court be upheld with respect to its right to enter the interlocutory decree in question for the purpose of preserving the subject matter of the litigation pending appeal, and that said interlocutory decree, to the extent that it authorized the cost of drilling the wells to be paid out of the proceeds

of the oil, be held not to have been an abuse of discretion on the part of the Bankruptcy Court.

Respectfully submitted,

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APPENDIX.

[Decision of the Circuit Court of Appeals of the Seventh Circuit handed down November 6, 1939, in direct conflict with the decision of the Eighth Circuit sought to be reviewed.]

In the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

October Term and Session, 1939.

No. 6856.
The Carter Oil Company,
Plaintiff-Appellant,
vs.
John F. Welker et al.,
Defendants-Appellees.

No. 6861.
The Carter Oil Company,
Plaintiff-Appellee,
vs.
John F. Welke and Nellie E. Welker,
Defendants-Appellants.

Appeals from the District Court of the United States for the Eastern District of Illinois.

November 6, 1939.

Before SPARKS, TREANOR and KERNER, *Circuit Judges*.

SPARKS, *Circuit Judge*. The Carter Oil Company appeals from a decree dismissing for want of equity its suit

to enjoin appellees from drilling for oil and gas on certain premises claimed by appellant by virtue of a lease to itself. Appellees counterclaimed with a prayer that the lease upon which appellant based its claim be amended to exclude the premises in dispute, and that appellees' title to those premises be quieted and confirmed in themselves.

This appeal presents the question of the construction of a deed executed in 1912 which appellant contends merely conveyed an easement in the strip of land involved, leaving the fee simple interest in the grantor from whose successors in title it obtained the lease upon which this action is predicated.

The deed in question, executed on a printed form captioned a "Right of Way Deed," provided as follows (italicized portions represent those parts which were written in longhand with pen and ink):

> "This Indenture Witnesseth, That Illinoi W. Hess * * * in consideration of the benefits accruing to *her* by reason of the construction and operation of a railroad upon said land, and of the sum of *Two Hundred Fifty—50/100* Dollar, * * * does hereby convey and warrant to Eastern Illinois and Peoria Railroad Company, a corporation organized and existing under the laws of the State of Illinois, as and for its right of way, a strip of land *One Hundred (100)* feet wide, being *Fifty (50)* feet wide on *each side* of a line that has been surveyed and located across and upon the following described real estate, to wit: *Over and across the North-East 1/4 of the North-West 1/4 of Section Eighteen (18), Township Seven (7) North Range Three (3) East of the 3rd P. M. Containing in all Three and Thirty-Four Hundredths acres more or less.*
>
> * * * * * * *"

The strip conveyed was part of a 160-acre tract then belonging to Mrs. Hess, the grantor. At the time of the

execution of the deed there had been a survey, and the strip involved had been marked off by stakes extending across the farm. However, at the time of trial it was testified that the stakes had long since disappeared, and the tenants of the tract across which the strip extended had farmed it along with the balance of the tract. The railroad company had never used the strip for right of way purposes, but it had paid taxes on it from the time of the conveyance. Subsequently the tract was divided between the heirs of Mrs. Hess, and John Welker became the owner of the forty-acre tract across which the 3.34-acre strip previously conveyed to the railroad extended. The partition was made by the parties with the understanding that John would get only 36.66 acres out of the quarter. In addition, he owned several other tracts of land, all of which were included in a lease executed by him and his wife in August, 1936, to one Von Almen who assigned it to appellant, the Carter Oil Company, granting the right to drill for the oil and gas on the premises. The lease described the premises as follows:

> S½ of SE¼ of Sec. 7 containing 80 acres
> NE¼ of NE¼ of Sec. 18 containing 40 acres
> NE¼ of NW¼ Sec. 18 containing 36 66/100 acres
> W. part of N½ of NW¼ and SE¼ of NW¼ of Sec. 8 containing 56 acres, of Section 7-18-8 Township 7 N. Range 3E containing 213 acres, more or less, it being the purpose and intent of the lessor herein to lease all of the lands, however described, owned by the said lessor in the section or sections specified.

Appellees Luttrell, Holleman, and Hinkle began the drilling operations, now sought to be enjoined, in September, 1938. They held a lease covering the west half of the 3.34-acre strip from one Metzger who obtained title to it from one Hausmann to whom the railroad had conveyed it. Metzger also held quitclaim deeds to the 3.34-acre strip

from all the heirs at law of Mrs. Hess. When appellees started drilling their well, the Carter Oil Company was also drilling an oil well 660 feet from its location, and the court found that if the well drilled by Luttrell, Holleman, and Hinkle were brought in, it would drain oil from under the adjoining land, which oil was owned by the Carter Oil Company.

The court concluded as a matter of law that the deed of 1912 from Mrs. Hess to the railroad conveyed the fee simple interest in the real estate involved, which interest was not limited by the definition in the deed of its purpose, "as and for its right of way." It therefore held that the equities were with the defendants and dismissed the bill of complaint for want of equity. It also concluded, however, that the oil and gas lease executed by the Welkers to appellant's assignor would have conveyed the entire interest in the strip had they been the owners of it, hence appellees would not be entitled to the affirmative relief prayed in their answer and counterclaim.

Whether the particular form of deed here involved results in the creation of a fee simple interest in the grantee or only an easement has never been determined by the Illinois courts so far as we can find. The question has been presented to courts of other jurisdictions and they have divided on their decision of it. See cases cited, pro and con, in a footnote to *Magnolia Petroleum Co. v. Thompson*, 106 F. 2d 217 at 227. See also annotations in 84 A. L. R. 271; 94 A. L. R. 523; 66 L. R. A. 36; L. R. A. 1918 B, 695. The difficulty of the question is well illustrated by the fact that opposite conclusions were reached by the District Court in the case at bar (see *Carter Oil Co. v. Welker*, 24 F. Supp. 753) and the Court of Appeals for the Eighth Circuit in the Magnolia case, *supra*, both after very scholarly study of the issues and the authorities upon precisely the same type of deed and both arising un-

der the Illinois law. Since the opinions in both of those cases contain excellent analyses of the significant cases bearing on the subject as well as the applicable Illinois statutes,[1] we deem it unnecessary to repeat that discussion here, and therefore refer to only a few of the cases.

While the Illinois courts have not passed on the identical question involved, there are several cases to the effect that the recitation of the purpose of the conveyance does not limit the title conveyed. See *Supervisors v. Patterson*, 56 Ill. 111; *Tinker v. Forbes*, 136 Ill. 221; *Downen v. Rayburn*, 214 Ill. 342, all relied upon by the District Court. In these cases we find the conveyance of a lot or tract, "for a courthouse and other county buildings," "also for the purpose of locating proper water wheel and races to draw water," "to be used as a church location," all of which conveyances were held to transfer the fee simple interest, notwithstanding the recitation of purpose. The Magnolia case holds that these cases are not authority for the construction of the deed here involved for the reason that in those cases the question was whether a fee simple was conveyed or only a determinable fee, and that in such cases the courts do not look with favor upon conditions subsequent, hence will not construe words indicating purpose or use as restrictions. The situation is different, it holds, when the question is whether a fee is conveyed or only an easement, in which case words "which, if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed."

We do not agree with this distinction. To us, the significant question appears to be, whether *land* is conveyed by the deed, or merely a *user* of the land. Much of the confusion on this subject has arisen from failure to distinguish between deeds granting the land and deeds grant-

[1] Illinois Revised Statutes, 1937, chap. 30, section 12; chap. 114, section 20 (3).

ing a right of way over the land. For example, 1 Thompson on Real Property 534, section 421, states: "Where the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed." The Magnolia case quotes this as stating the generally accepted rule, apparently accepting it as authority for the construction of deeds similar to the one here involved. However, the three cases cited by Thompson as supporting his statement involve deeds which are quite unlike the one involved in the case at bar and in the Magnolia case. In *Jones v. Van Bochove*, 61 N. W. 342, the deed conveyed "the right of way for a railroad * * and described as follows: 'A strip of land * * *.'" In *Blakely v. Chicago R. Co.*, 64 N. W. 972, the significant words were: "Do hereby grant, bargain, sell, and convey unto the * * (R. R. Co.) its successors and assigns, for right of way *and for operating its railroad only.*" (Our italics.) *Biles v. Tacoma, O. & G. H. R. Co.*, 32 Pac. 211, involved a conveyance by the Northern Pacific Railroad of a forty-acre tract which it then owned, to one Biles, by warranty deed, "reserving and excepting therefrom, however, a strip of land extending through the same * * two hundred feet on each side of the * * (railroad) to be used for a right of way or other railroad purposes * *." Later another railroad laid tracks across the strip and the grantee sought to oust it, claiming title to the land. The court discussed the technical distinction between the words "reserve and except" and decided that since both were used, it became necessary to look at all the surrounding circumstances to determine that an easement was intended to be reserved rather than the fee in the strip excepted. Since none of the cases cited to the text involves a deed conveying a strip of land as and for a right of way, we do not consider the statement of the rule applicable here.

A similar failure to analyze the deed involved is found in 16 Am. Jur. on Deeds, section 245, which states the rule: "If, in a deed to a railroad, the land conveyed is described as a right of way, the deed may be construed as giving an easement right only, and not the full fee, notwithstanding there are other words in the deed referring to the fee simple, for such a conveyance does not imply a grant of the easement forever." The case cited as authority for this rule is *East Alabama R. Co. v. Doe*, 114 U. S. 340. We find, however, that in that case, there was no land conveyed, but the deed recited: "* * doth give, grant, bargain and sell unto the said railroad company * * the right of way over which to pass at all times * * * and to this end the limit of said right of way shall extend * *" Clearly this was intended to convey only a *right* and not *land*, and the rule as stated above only confuses the issue.

We conclude that, in the absence of a contrary decision by the Illinois courts, we prefer to follow the rule that a deed conveying a strip of land, even though the purpose be recited, is to be construed as conveying a fee simple interest in the grantee rather than an easement of use. We do not agree with appellant's contention that the words "over and across" written in longhand in the deed limited the conveyance to an easement. We think the words "over and across" refer only to the surveyed line by which the exact location of the land was to be determined.

Appellant also contends that, even though the deed might be construed as intended to pass the fee interest, it was void for indefiniteness of description. We do not agree with this contention. While the deed did not specify the exact location of the strip by metes and bounds, it referred to a survey previously had by which the exact location could be ascertained, and this was sufficient to render the deed effective, particularly in view of the fact that stakes were driven along the line at the time. See 4 Thompson on Real Property (1924), §§ 3074, 3095.

Decree affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

REPLY BRIEF OF PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

REPLY BRIEF OF PETITIONER.

JURISDICTION.

Writ of Certiorari in This Case Was Not Improvidently Granted.

(a) Respondents, in urging that the Court of its own motion dismiss the writ of certiorari, cite and rely upon the decision of this Court in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 206, wherein the Court said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opin-

ion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.'"

The Court of Appeals of the Eighth Circuit, in the *Magnolia case* under review, and the Court of Appeals of the Seventh Circuit, in the *Carter Oil Company case* (see *Appendix to Brief of Petitioner*) do not predicate their respective decisions upon the laws of different states, but both decisions attempt to construe the *Illinois Conveyance Act* and the authoritative decisions of the State of Illinois with respect to an Illinois conveyance. The conflict, therefore, is not merely corollary to a permissible difference of opinion between different state courts. Both decisions attempt to analyze the situation in the light of the Illinois statutes and cases, and the Circuit Court of Appeals of the Seventh Circuit, in the *Carter Oil Company case* has specifically found that the Court of Appeals of the Eighth Circuit, in the *Magnolia case*, under review, has decided an important question of local Illinois law in a way in conflict with applicable local decisions.

The intolerable situation growing out of this conflict is not one of mere theory. Petitioner is confronted with a situation where title to oil rights on other adjacent right-of-way property involving in excess of a half million dollars will depend entirely on whether the litigation can be forced to trial in the United States Court at St. Louis, Missouri, or in the United States Court in East St. Louis, Illinois.

This direct conflict between the decisions of different circuits both respecting Illinois conveyances, the great loss that will result from delay, and the fact that substantial property rights must be immediately determined under one or the other of these conflicting decisions amply justi-

fied the granting of certiorari in this case, especially where the decision sought to be reviewed has so obviously decided an important question of local law "in a way *probably* in conflict with applicable local decisions."

It is true that the Court of Appeals of the Seventh Circuit in the Carter Oil Company case has not yet passed upon the motion for rehearing, and it seems quite apparent that said Court will withhold its ruling on said motion pending this Court's decision in the Magnolia case here under review. It is not necessary that the motion for rehearing be disposed of to make the decision final (*Southern Railway Co. v. Clift*, 260 U. S. 316, 318). Furthermore, even if the decision in the Carter Oil Co. case be not final, it brings to the attention of this Court the very apparent fact that the decision in the Magnolia case under review "has decided an important question of local law in a way *probably* in conflict with applicable local decisions," which is of itself sufficient to warrant this Court retaining jurisdiction.

(b) Among the grounds for certiorari recognized by this Court's *Rule No. 38* is the fact that the Circuit Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way probably in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision."

In the first sentence of *brief of respondents*, it is stated that "there are no matters of general importance respecting the jurisdiction of the bankruptcy court involved." We respectfully submit that there is involved the right of the bankruptcy court as a preliminary inquiry to determine its own jurisdiction to proceed to examine and decide in a summary proceeding the merits of an adverse claim.

If its jurisdiction depended upon the actual or constructive possession of the *res* by the debtor's trustee, then the Court had a right to determine this question and to make necessary orders to conserve the fugitive subject matter of the litigation pending appeal from the decision on the issue of possession. The oil was therefore removed and conserved under and pursuant to a decree of a court having competent jurisdiction to determine the question of possession, and it was not removed and sold under a void decree of a court which had no jurisdiction whatsoever. If the Court had jurisdiction to determine the question of possession, the jurisdiction to determine that question carried with it the right to conserve the subject matter of the litigation pending its determination, and the jurisdiction to proceed to this extent was not retroactively nullified by the decision of the Court of Appeals to the effect that the District Court's decision respecting possession was wrong. If the Court had jurisdiction to proceed, but wrongly determined the issue of possession, the remedy would be *restitution* and not damages for *conversion*. Restitution proceeds upon the theory that what has been done pursuant to the orders of a court of competent jurisdiction is lawfully done, but that the unsuccessful litigant cannot retain the benefits acquired under such wrongful order.

The Court of Appeals in the case under review directed the lower court to dismiss the proceedings "for want of jurisdiction". (R. 157). Opposing counsel contend that "the bankruptcy court was acting without jurisdiction, and all of its orders were void and in excess of and beyond its jurisdiction" (*Respondents' Brief*, p. 51). It is our contention that the Court did have jurisdiction to determine the question of possession, and the decision of the Appellate Court did not make void that which was lawfully, even though wrongly, done by the lower court.

If we are wrong on the merits of this controversy, it is an important matter arising under the bankruptcy law for this Court to determine whether the lower court had jurisdiction, pending determination of the question of possession and pending review by the Appellate Court of its decision on that issue, to take action to conserve the subject matter of the suit. And it is equally important for this Court to determine whether the action taken in this respect by the lower court exceeded the exercise of sound discretion.

For the reasons aforesaid, we respectfully submit that this Court should disregard request of respondents that the writ of certiorari be dismissed as improvidently granted.

REPLY TO RESPONDENTS' ARGUMENT ON THE MERITS.

Under the specific terms of Sections 9 and 13 of the *Illinois Conveyance Act* as set forth on pages 12 and 13 of petitioner's original brief, deeds following the form and language of those in question pass a fee-simple estate of inheritance "if a less estate be not limited by express words or do not appear to have been granted, conveyed or devised by construction or operation of law"; and in determining whether language following the grant is a limitation or a mere description of the intended use, all doubts must be resolved in favor of the unrestricted use and in favor of the grantee (*Original Brief*, pp. 13 and 14).

Opposing counsel beg the real question at issue by assuming that the faces of the deeds disclose no ambiguity or doubt, but, on the contrary, clearly evidence an intended conveyance of a mere right of way easement. They rest this contention solely upon the following groups of words appearing in the deeds, to wit: "*a strip of ground*," "*for right of way*," "*over and across*" (*Respondents' Brief*, p. 22).

Since the Illinois law permits a carrier to acquire the fee-simple absolute title to a strip or gore of land on which its railroad is to be situated, the mere narrowness of such a strip over and across acreage property does not of itself indicate an intention to restrict the grant to an easement. The applicable statutes and decisions to this effect are cited on page 12 of original brief of petitioner.

The use of the words "*over and across*" have no significance one way or another. We have fully discussed this on pages 31 to 34, inclusive, of our original brief.

This leaves for consideration the words "*for right of way*," as used in the phrase "*a strip of land for right of way*." We are thus brought back to the real issue in this

case, namely, do the words "for right of way" following the description of the grant as a strip of land constitute a limitation of the use for right of way only, or is it merely descriptive of the intended use for the purpose of locating the particular strip of land conveyed? The description in the deed was indefinite, but was made definite by the location of the railroad (*C. & A. Ry. Co. v. Langer*, 288 Ill. 16, 123 N. E. 61). The conveyance of a strip of land sixty feet wide across acreage property might be void for uncertainty were the location not described by its intended use as a railroad right of way. It becomes definite when the road is constructed and the right of way fenced. It was necessary to refer to the use for the purpose of locating the particular strip, and the description of the intended use is not necessarily to be construed as a limitation or restriction of the use. We therefore have exactly the kind of an ambiguous deed to which the rules of construction first above mentioned are to be applied, and according to these rules the conveyance is a fee-simple estate of inheritance with any ambiguity respecting the limitations of use resolved in favor of the grantee and in favor of the unrestricted use.

How can it be argued that the words "*for right of way*," as so used, evidence an intention to convey a mere railroad easement? Such a contention begs the question and does violence to the specific provisions of the *Illinois Conveyance Act* and the applicable decisions cited on pages 16 et seq. of our original brief. Quite obviously, to say that a mere right of way easement will accomplish the purpose intended is to assume that the purpose intended is to limit the use to right of way purposes. But how do we know that the purpose intended in the use of the phrase "*for right of way*" was to limit the use to right of way purposes rather than merely to describe the intended use for the purpose of locating the particular sixty-foot strip conveyed? We do not know it from anything ap-

pearing on the face of the deed, and such a conclusion ignores the authoritative Illinois decisions and statutes on which we have so strongly relied.

The logical steps that should be considered are: Do the words "*for right of way*," following the description of the grant, constitute a *limitation* or merely a *description* of the use? If merely a description of the use, then the conveyance is of the fee simple absolute. If it be a limitation of the use, we must then further inquire: Will the right-of-way easement accomplish the same purpose as a grant of the fee limited in duration and use to railroad right-of-way purposes? If it does, the deed conveys an easement. If it does not answer the same purpose, the conveyance is of a base or determinable fee. It will not do to say that an easement will accomplish the same purpose as the fee-simple absolute title. It will not. This is recognized by the fact that a railroad is permitted to acquire the fee to the land on which its right of way in Illinois is situated. A contrary conclusion would signify that a railroad company could never acquire the fee because it would not need the fee for right-of-way purposes. This is not the law in Illinois, although it may be the law in Kansas and was once the law in Missouri.

We therefore respectfully insist that in determining whether the words "*for right of way*" in the conveyances in question are merely descriptive of the intended use, we must apply the analogous Illinois decisions set out on pages 16 *et seq.* of our original brief, and we cannot nonchalantly brush these decisions aside with the casual comment that they are not applicable to easements. An easement signifies a limitation of the duration and use to an even greater extent than does a base or determinable fee. If the language "*for right of way*" cannot be construed as a limitation of the duration and the use to railroad right-of-way purposes, then how can it be construed as creating an easement?

There is no decision in Illinois that justifies any such contention. On the other hand, there are several well-considered authoritative decisions cited on pages 16 et seq. of our original brief which specifically hold that such a description of the intended use following the grant cannot be construed as a limitation of the free and unrestricted use—in other words, it cannot be considered as limiting the conveyance in such a manner as to make it a mere right-of-way easement or any other estate less than the unrestricted fee absolute. The fallacy of respondents' arguments lies in their contention that the words "*for right of way*" signify a limitation of the use for right-of-way purposes, whereas such a construction is in direct conflict with the provisions of the *Illinois Conveyance Act* and with the Illinois decisions on which we have so confidently relied in our original brief.

In *Noyes v. St. L. A. & T. H. R. Co.*, 21 N. E. 487 (Ill.), the grant was of "*a strip of land 4,000 ft. long and 350 ft. in width*" for "*general railroad purposes.*" The Court held that this description of the intended use did not limit the grant. By analogy, can it be argued that the conveyance of a *strip of land 60 feet wide* for *right of way* limits the use to mere easement purposes? Had the conveyance been of a mere right of way, the right of way could be used for yards, side tracks, and general railroad purposes (*Walker v. I. C. R. Co.*, 215 Ill. 610, 74 N. E. 821). What, then, is the distinction between the conveyance of a strip of land "*for right of way*" and the conveyance of the same strip of land "*for general railroad purposes*"? We fail to see any distinction. The conveyance in each instance is of the strip of land, and the designation of the intended use does not limit the grant to an easement. The fact that the Supreme Court of Illinois has never attempted to draw a distinction between the conveyance of *a strip of land for right of way* and the conveyance of *a strip of land for*

general railroad purposes is of no consequence. It might just as consistently be argued that, because the Supreme Court has not passed upon a contract for the sale of *a white horse*, the decision respecting the sale of *a black horse* under the same terms and conditions would not be controlling. Whether the description be "*for right of way*" or "*for general railroad purposes*," it is in either event a mere description of the same intended use for which the strip of land to which the railroad company may legally acquire fee-simple absolute title is conveyed.

Waller v. Hilderbrecht, cited on page 19 of respondents' brief, and *Sullivan v. Eddy*, cited on page 31 of respondents' brief, are discussed and distinguished on pages 28 to 31, inclusive, of original brief of petitioner, and need no further discussion. Other points raised by respondents have been anticipated and fully answered in our original brief.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

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GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

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vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE.

Respondents deem it advisable to make a brief additional statement in order to bring before this Court the issues presented by the petition.

This controversy arises in a summary proceeding under Section 77 of the Bankruptcy Act (*11 U. S. C. A. 205*), for the reorganization of the Missouri Pacific Railroad Co.,

Debtor, and Missouri-Illinois Railroad Co., Subsidiary Debtor.

The Trustee (Petitioner here) filed a petition with the Reorganization Court, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, which, in its essence, was a petition to quiet title to a part of the railroad right of way of the Subsidiary Debtor, Missouri-Illinois Railroad Company, located in Illinois.

The Trustee had succeeded to the title, of the Subsidiary Debtor, to the right of way which had been conveyed to predecessors of the Subsidiary Debtor by right of way deeds, two of which were dated in August, 1896, and one in January, 1898.

It was contended by the Trustee that these deeds conveyed to his predecessors in title the fee to the property in question. The provisions of these deeds, and, in particular, the granting clauses thereof, which are substantially the same, are set forth in the Trustee's petition (Tr. of R. 4-5), and in the opinion of the Circuit Court of Appeals (Tr. of R. 167). For the Court's convenience, we set forth the granting clause of the first deed as follows:

> "A strip of land for right of way for said railroad company sixty feet wide over and across the southwest quarter (¼) of the northeast quarter (¼) of section twenty (20), township two (2) north, range two (2) east of the third Principal Meridian" (Tr. of R. 167).

Respondents, who had served notice of their claim to the ownership of the oil and mineral rights in and underlying said premises (Tr. of R. 3-4), were notified by registered mail of the filing of the petition and directed to appear and be heard at the time of the presentation thereof (Tr. of R. 57).

Respondents appeared and filed answers to the Trustee's petition, contesting the jurisdiction of the Reorganization Court to adjudicate the question of title and to grant the Trustee the relief prayed for, on the ground that the deeds under which the Trustee claimed title conveyed no more than an easement or right of way for railroad purposes, and that they, by virtue of certain oil leases from the fee owners, were vested with title to all the oil and mineral rights under the right of way, and further challenged the jurisdiction of the Reorganization Court to grant the Trustee the requested power of a receiver *pendente lite* and the authority to drill on said right of way and to remove, conserve and market the oil and gas from said premises and out of the proceeds of the oil recovered to pay such expenses (Tr. of R. 38-56).

The Reorganization Court, after a hearing, found that the Trustee was in possession of and was vested with title to said oil and gas, and granted the Trustee all the relief prayed, vesting him with the powers of a receiver *pendente lite* without bond, and authorizing him to drill, market and sell the oil and to pay all expenses out of the proceeds thereof, and enjoining Respondents from asserting any rights or claims to the oil and gas other than in the reorganization proceedings and from interfering with the drilling of the wells and marketing the oil (Tr. of R. 57-60).

Upon appeal to the United States Circuit Court of Appeals that Court held, in accordance with the contentions of Respondents, that said deeds granted only a right-of-way easement to the railroad company; therefore, it appeared on the face of the petition that the Trustee had no possession, actual or constructive, of the oil and gas rights, and that consequently the Court was without jurisdiction to enter the order. The case is reported *106 F.* (2nd) *217*.

SUMMARY OF ARGUMENT.

NO GROUNDS EXIST WHICH WOULD JUSTIFY THE EXERCISE BY THIS COURT OF ITS POWER TO GRANT A WRIT OF CERTIORARI.

I.

This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.

Under well-established principles the power of this Court in granting writs of certiorari under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347a) is to be exercised only when there are special and important reasons therefor.

The petition presents no questions of gravity or importance because of the legal, economic or social problems involved. The amount in controversy, as suggested by petitioner (Br. 9), is no criterion by which the importance of litigation is measured in order to justify this Court's issuance of its writ of certiorari.

II

The Court of Appeals, in rendering its opinion, disregarded no controlling Illinois decisions.

The railroad right of way in question is located in the State of Illinois, and it was recognized by the Court of Appeals and by the litigants that their respective interests in the property should be determined by the statutory and case law of that State. However, there is no Illinois decision in which a deed has been construed where the granting clause is identical with that found in those deeds. Under such circumstances the Court of Appeals

followed established judicial precedents in analyzing the issues, and in reaching its decision it was controlled and guided by the applicable Illinois law of conveyancing (Tr. of R. 173-176), and the Illinois cases upon which Petitioner relies were considered and distinguished (Tr. of R. 177-180).

III.

The petition presents no important jurisdictional question arising under the Federal Bankruptcy Act.

(1) A United States District Court handling a reorganization of a railroad under Section 77 of the Bankruptcy Act (11 U. S. C. A. 205), is essentially a Bankruptcy Court with the same jurisdiction as to the bankrupt and its property (*Thompson v. Terminal Shares*, 104 Fed. [2nd] 1; cert. den. cases 219, 180, Oct. 6, 1939).

The same is true of a Reorganization Court acting under Section 77b (*In re Prima Company*, 98 Fed. [2nd] 952, cert. den. 305 U. S. 658; *First National Bank v. Conway*, 94 Fed. [2nd] 736, cert. den. 304 U. S. 578).

The jurisdiction of an ordinary Court of Bankruptcy over the bankrupt and his property has been repeatedly held to exclude jurisdiction concerning property not in the actual or constructive possession of the Trustee, and such Court has no jurisdiction to adjudicate adversary claims to the title to property, without consent, not in the actual or constructive possession of the Trustee (*Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al.*, 264 U. S. 426).

There is no public policy or compelling reasons to grant to a Reorganization Court, under Section 77, a greater quantum of jurisdiction to adjudicate controversies relating to property than an ordinary Bankruptcy Court would have.

(2) The Circuit Court of Appeals did not rule in its decision, as suggested by Petitioner, that a Bankruptcy Court does not have the right as a preliminary inquiry to determine its own jurisdiction.

The Court of Appeals expressly recognized this principle (Tr. of R. 172-173). However, in this instance, the want of jurisdiction appeared on the face of the petition itself, that is, in the deeds on which Trustee's claims were predicated. No further inquiry was needed. Consequently, the Reorganization Court's proceedings, rulings and findings, when the lack of jurisdiction thus appeared, were void and a nullity (*Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 640).

IV.

The opinion is not in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit, and, even if it is, that would not justify certiorari because the decisions involve questions of local law of different States.

If there is a conflict (which Respondents deny), "the conflict may be merely corollary to a permissible difference of opinion in the State Courts" (*Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202), and, therefore, not a ground for certiorari.

ARGUMENT.

NO GROUNDS EXIST WHICH WOULD JUSTIFY THE EXERCISE BY THIS COURT OF ITS POWER TO GRANT A WRIT OF CERTIORARI.

I.

This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.

Under well-established principles, the power of this Court to grant writs of certiorari under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347a) rests in the discretion of the Court. As has been many times declared, this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions.

That these cases, which were submitted and decided in the Court of Appeals, are not of sufficient gravity or general importance to justify the exercise of the power to grant a writ of certiorari is apparent from the petition. In the final analysis the controversy is one between the Trustee in a railroad reorganization, who is reaching out under the color of railroad right-of-way deeds executed in 1896, to engage in exploring, drilling and selling oil in competition with private corporations chartered for that purpose, who have oil leases on the same property. This is just a private suit over the title to property.

No important legal, economic or social problem is involved. The mere fact that a large sum of money is involved, which the petition suggests entirely outside of the record (Br. 9), does not transform a controversy between private litigants, decided upon ordinary principles of law, into a cause of special importance or gravity beyond the importance to the litigants themselves.

II.

The Court of Appeals in rendering its opinion disregarded no controlling Illinois decisions.

One of the principal grounds that Petitioner urges for the issuance of a writ of certiorari is that the decision of the Court of Appeals failed to follow controlling Illinois decisions.

The railroad right of way in question is located in the State of Illinois, and it was recognized by the Court of Appeals and by the litigants that their respective interests in the property should be determined by the statutory and case law of that State (Tr. of R. 173). However, no Illinois decision was found in which a deed had been construed by the courts of that State where the granting clause was identical with that found in these deeds. Under such circumstances the Court of Appeals had no alternative but to analyze the issues, and, in reaching a decision, be controlled and guided by the adjudicated principles of Illinois law of conveyancing.

Respondents believe that this Court will be impressed by the painstaking care employed by the Court of Appeals in considering and following the Illinois law and in distinguishing the cases relied upon by Petitioner both in this Court and in the Court of Appeals.

Petitioner, in his petition and brief in this Court, cites no new cases, nor does he advance any contentions other than those previously presented to the Court of Appeals. He concedes that the Court of Appeals considered and distinguished the Illinois decisions cited by him, but he now asks for a reargument in this Court of the same issues on the same authorities which were presented to and argued in the Court of Appeals. In other words, in its essence, this point is an attempt to make certiorari perform the office of a further appeal on the same question.

This is not within the contemplation of the rules or the decisions of this Court applying to certiorari.

In view of the able opinion of the Court of Appeals, it would be an imposition and a burden upon this Court to reanalyze, rediscuss and reargue the Illinois law on this subject. It is ably collated and summarized in the opinion of the Court of Appeals (Tr. of R. 173-180).

It is important to note, however, that in arriving at its decision the Court of Appeals recognized the doctrine that the cardinal principle of construction should be to give effect to the intent of the grantor, as it may be collected from the whole instrument. The Court of Appeals also was controlled by the general principle of construction followed by the courts of Illinois in construing right-of-way deeds, as expressed by the Supreme Court of that State in the case of *Branch v. Central Trust Co.*, 320 Ill. 432-440, 151 N. E. 284. In that case the Supreme Court of Illinois, on pages 440-442 of the opinion, said:

> "The grant to a railroad company of a right of way over, through and upon land described does not convey the fee to any part of the land described, but only the right to use the land for railroad right-of-way purposes. * * * These cases make it clear that in this State a grant of a right of way to a railroad company does not convey a fee in the land, but conveys an easement, only * * *."

After a thorough consideration of the deeds and of the Illinois cases and rules of construction, the Court of Appeals arrived at the conclusion, which is evident, that in each deed the "clear intent, expressly stated, was to convey to the railroad company only a right-of-way easement for its railroad, and not a fee" (Tr. of R. 176).

In addition to contending that the Court of Appeals did not follow certain cases (Br. 10), which were expressly considered and distinguished (Tr. of R. 178-180), Peti-

tioner complains that the Court of Appeals improperly gave weight to the case of *Waller v. Hildebrecht*, 295 Ill. 116-121, 128 N. E. 807. In that case the Supreme Court of Illinois held that in construing instruments of the character of the deeds in question the Court will look to the circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained, in order to ascertain and give effect to the intention of the parties. In that case the further rule was announced that where a particular or special right or easement in land is conveyed, which may well coexist and be enjoyed and used by the grantee concurrently with the ownership of the fee by the grantor, the fee does not pass, because it is not essential to the right or interest which is described in the deed.

This ruling is most pertinent to the case at bar, because at the time of these original conveyances the circumstances were that a railroad right of way was to be obtained and the railroad track built over and across the property. That was all that was in the contemplation of the parties. It was not necessary then, nor is it now, for the enjoyment of the right to operate the railroad over and across this land, that the fee in the land should pass. Petitioner never did, and does not now, show any reason why the grant should be enlarged beyond the original intention of the parties, or why there is any distinction between the conveyance of a right of way and the conveyance for a right of way.

Petitioner seems to contend that the decisions of Illinois required the Court of Appeals to delete or disregard the words "for right of way for said railroad company" and the words "over and across," which were used in the granting clause of the right-of-way deeds. The grant, with these words deleted, would read, "a strip of land * * * sixty feet wide * * * the Southwest Quarter (¼) of the

Northeast Quarter (¼) of Sec. 20." It will be readily observed that the words "over and across" are absolutely essential to complete the description of the property granted, and without them there would be no grant.

The Court of Appeals, in following these authorities, correctly ruled "that the language used to describe the easement is apt and appropriate for that purpose and no other. It designates the land to be subject to the use—'a strip of land sixty feet wide * * * over and across'; it describes the use permitted—'for a right of way for said railroad.' This language made it perfectly clear that the parties met for the sole purpose of contracting for a railroad right of way" (Tr. of R. 176).

Petitioner asserts that the reasoning of the Court of Appeals is fallacious in making a distinction between cases where it is held that the use of certain language constitutes a condition subsequent so that the property reverts to the grantor on condition broken and cases involving the question of whether or not certain language should be construed to convey a fee or only an easement. However, no reason whatever is given for such assertion, and it seems obvious to Respondents, as it did to the Court of Appeals, that there is a clear distinction between those cases.

The rules and decisions of this Court only contemplate the exercise of its power to grant certiorari when a Court of Appeals has failed to follow controlling local law, and not when the Court of Appeals has decided adversely to one party's contention. The writ of certiorari is no substitute for an appeal, as Petitioner in effect argues.

III.

The petition presents no important jurisdictional question arising under the Federal Bankruptcy Act.

(1) The second principal ground urged by Petitioner, for the granting of the writ prayed for, is that, assuming that the Court of Appeals properly decided that the Trustee had no more than an easement for railroad purposes, then there are presented important jurisdictional questions arising under the Federal Bankruptcy Act.

The contentions of Petitioner on these points are somewhat obscure. It is apparent, contrary to Petitioner's suggestions, that adverse possession has nothing to do with the case. The jurisdictional question is whether the Trustee had actual or constructive possession of the oil and gas underlying the right of way, regardless of the manner in which the possession was acquired.

Petitioner argues that a railroad easement constitutes possession of both the surface and the sub-soil, and in support of said contention cites *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47; *Kern River Co. v. U. S.*, 257 U. S. 147-151, and *Western Union v. Penn. R. R. Co.*, 195 U. S. 540-570. These cases and the argument now advanced were fully considered and disposed of by the Court of Appeals. It is pointed out by the Court of Appeals in the opinion that even if the grant of a railroad right of way gave a right to the exclusive use of the surface for railroad purposes it would not give a fee title to the oil and gas several hundred feet below the surface, and that, in any event, the extracting and selling of oil and gas is not an element of use of a railroad right of way.

In the quotation from *Western Union v. Penn. R. Co.*, 195 U. S. 540-570, appearing on page 15 of the brief, counsel do not quote enough to indicate what this Court meant when it stated that a railroad right of way was

more than an easement. On the same page quoted from, this Court goes on to cite with approval the case of *Pennsylvania R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, where it is said:

> "It is a fee in the surface and so much beneath as may be necessary for support * * *.'"

It is, therefore, clear that this Court simply meant that a railroad may own the fee in the surface of its right of way, plus as much beneath the surface as may be necessary for the support thereof. No one would contend that for this purpose the railroad company needed or intended to acquire the right to the oil and gas under its right of way.

Furthermore, the Court of Appeals was bound to follow the decisions of Illinois, even if there had been some prior decisions of this Court to the contrary. In the case of *Branch v. Central Trust Co.*, 320 Ill. 432-442, where a railroad right of way was conveyed, it was expressly held that in Illinois a grant of a right of way to a railroad company does not convey a fee, but only conveys an easement. That decision was properly followed by the Court of Appeals. Furthermore, the Supreme Court of Illinois in the case of *Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 131 N. E. 645, has recognized that the owner of an easement has no right to participate in the profits of the soil charged with an easement.

Petitioner apparently further argues that, notwithstanding this established law, a Trustee, acting under Section 77, in a proceeding to reorganize a railroad, would, by virtue of his possession of a surface easement for railroad purposes, have sufficient possession of the sub-soil, oil and minerals lying underneath, to confer jurisdiction on the Reorganization Court in a summary proceeding to adjudicate questions of title.

A United States District Court handling a reorganization of a railroad under Section 77 of the Bankruptcy Act is essentially acting as an ordinary Bankruptcy Court with the same jurisdiction, with respect to the bankrupt and its property (*Thompson v. Terminal Shares*, 104 Fed. [2nd] 1, cert. den. cases Nos. 219, 180, Oct. 6, 1939). The same is true of a Reorganization Court acting under Section 77-B (*In re Prima Co.*; 98 Fed. [2nd] 952, cert. den. 305 U. S. 658; *First Nat. Bank v. Conway*, 94 Fed. [2nd] 736, cert. den. 304 U. S. 578).

The jurisdictional provisions of Section 77-B are identical with Section 77, as amended in 1935, with respect to the jurisdiction of the Reorganization Courts (*Thompson v. Terminal Shares*, 104 Fed. [2nd] 1, cert. den. cases 219, 180, Oct. 6, 1939).

Consequently, a Reorganization Court, whether it be a railroad reorganization under Section 77 or a corporate reorganization under Section 77-B, has the same jurisdiction as an ordinary Court of Bankruptcy over the bankrupt and its property.

The jurisdiction of a Court of Bankruptcy over the bankrupt and his property has been repeatedly held to exclude jurisdiction concerning property not in the actual or constructive possession of the Trustee, and such Court has no jurisdiction to adjudicate adverse claims to the title to property, without consent, which is not in the actual or constructive possession of the Trustee (*Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al.*, 264 U. S. 426).

In this same reorganization proceedings the Trustee contended, in the case of *Thompson v. Terminal Shares, Inc., supra*, that under Section 77 as amended the Reorganization Court had been granted a broader jurisdiction to proceed *in personam* than an ordinary Bankruptcy Court. This contention was decided adversely in the *Thompson* case by the United States Circuit Court of Appeals for

the Eighth Circuit, and this Court denied certiorari both prior to and after the decision of the Circuit Court of Appeals (*Tomlinson v. Thompson*, cert. den. 306 U. S. 652; *Thompson v. Terminal Shares, Inc.*, cert. den. cases 219, 180, Oct. 6, 1939.

In this petition the same Trustee is again contending that, because he is acting as a Trustee in the reorganization of a railroad under Section 77, the Reorganization Court should have a broader grant of power as to its jurisdiction over property than granted to ordinary Courts of Bankruptcy, namely, that the Reorganization Courts may, without consent, adjudicate adverse claims to title to property even though the same may not be in the actual or constructive possession of the Trustee. Petitioner cites no authority to support this contention, nor does he set forth any compelling argument based upon public policy or necessity.

If the *in personam* jurisdiction has not been expanded, it follows that the jurisdiction to adjudicate adverse claims to property, not in the possession of the Trustee and without the consent of the parties, should not be expanded beyond that of an ordinary Bankruptcy Court. There is no more reason why the Reorganization Court should have jurisdiction to settle questions of title to property, not belonging to or in the possession of the Trustee, in a railroad reorganization proceeding than it should have the power to enforce its process to bring persons from foreign jurisdictions into its court to adjudicate personal liability.

Consequently, the Court of Appeals was following a well-established precedent when it ruled that the Reorganization Court had no jurisdiction to adjudicate the questions of title involved, unless the Trustee was in actual or constructive possession of the property in dispute, that is, the oil and gas and mineral deposits.

Under the issues it was necessary, in determining the jurisdictional question, to decide the interest of the Trustee created by the deeds in question. Once it determined that these deeds granted only an easement for railroad purposes, and hence no right, title or interest in the underlying oil and gas, it then followed, under established bankruptcy principles, that the Reorganization Court had no jurisdiction and hence its findings, orders and decisions were void.

(2) A further jurisdictional question, urged by Petitioner, is to the effect that the Court of Appeals failed to consider the right of the Reorganization Court, in the first instance, to determine its own jurisdiction to entertain the proceedings.

In this we believe Petitioner is in error. The Court of Appeals recognized that the first problem confronting that Court, as well as the Reorganization Court, was to determine its jurisdiction to entertain the proceedings (Tr. of R. 171, 173).

Under the issues presented to the Reorganization Court the question of jurisdiction depended upon the interest to which the Trustee had succeeded by virtue of the right-of-way deeds. The granting clause of these deeds appeared on the face of the petition. Consequently, the lack or want of jurisdiction was thus apparent without more.

The Reorganization Court, in granting the relief prayed, held that the deeds in question conveyed a fee simple title to, and not an easement in, the strips of land described in the deeds. Thus the Reorganization Court thereby determined its jurisdiction, albeit, erroneously, as the Court of Appeals subsequently found. Since the basis of its jurisdiction was determined erroneously, it then followed that all of its orders and findings, as well as its decision, were null and void.

The contention here urged by Petitioner is further inapplicable because, at the time of the hearing, all parties were permitted to submit any and all evidence that they desired on the issues. If Petitioner desired to submit to the Court other evidence than that contained in the deeds, the opportunity was afforded. That the construction of the deeds would be determinative not only of jurisdiction, but of the rights of the parties, was thoroughly recognized by Petitioner's counsel. At the opening of the hearing in the Reorganization Court, counsel in effect so advised the Court (Tr. of R. 119, 120, 121).

Consequently, every opportunity was afforded Petitioner to present evidence on the question of jurisdiction. However, he decided to rely upon the wording of the deeds set out in the petition. Therefore he cannot now complain that the Reorganization Court did not have an opportunity to and did not determine its own jurisdiction. It, however, determined it erroneously.

IV.

The opinion is not in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit, and, even if it is, that would not justify certiorari because the decisions involve questions of local law of different States.

As a final ground for the issuance of certiorari, Petitioner contends that the decision of the Court of Appeals is in conflict with a decision of the Fifth Circuit, referring particularly to the case of *Kynerd v. Hulen*, 5 Fed. (2d) 160. Respondents believe that there is no conflict, and that the cases are clearly distinguishable. In the Kynerd case the deed did not anywhere purport to convey a right of way or a strip of ground for a right of way. It nowhere contained in the granting clause the language "for a right of way for said railroad company,"

or any similar language, as is true of the deeds in the case at bar. Furthermore, the words "upon, over and across" in the deed before the Court in the Kynerd case referred to the railroad track and not to the land granted. The land granted was described by metes and bounds. In the deeds in the present case there can be no question but that the words "over and across" refer to the land granted. The deeds unequivocally grant "a strip of ground for right of way for said railroad company 60 feet wide over and across" the land described. The exact location of the 60-foot strip "over and across" the land was not given. The location of that strip "over and across" the land was left to the railroad company. However, it had to be located "over and across" the land described. This necessarily limited the grant to an easement over and across and not a conveyance of the fee as was the situation in the Kynerd case. Therefore, it is manifest that, because of the difference between the two deeds, there is no real similarity between the two cases and hence no conflict.

Also, the Kynerd case involved questions relating to real estate located in Texas. The Federal Courts have always followed the laws of the several states as to questions of title to real property. If there is a conflict between the Kynerd case and the instant case, which Respondents do not admit, it may well be due to the difference between the conveyancing laws of the State of Illinois and those of the State of Texas, and hence not be a basis for certiorari.

Since the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, overruling the doctrine of Swift v. Tyson, the Federal Courts also follow the law of the several states as to all other controversies arising under the laws of the several states. It is conceivable that the various Courts of Appeal, in applying the law of the several

states, may render conflicting decisions upon the same or similar facts. Under such circumstances a conflict between opinions of the Courts of Appeal in cases involving the state law of the several states as to both real estate and commercial transactions will not, without more, justify certiorari. As was pointed out by this Court in the case of *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, "the conflict may be merely corollary to a permissible difference of opinion in the State Courts."

CONCLUSION.

The Court of Appeals properly reversed the District Court, and, in so doing, followed established judicial precedent.

It is therefore respectfully submitted that the petition presents no grounds which would justify the exercise by this Court of its power to grant a writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

BRIEF

In Opposition to Supplement to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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Respondent.

BRIEF

In Opposition to Supplement to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

I.

The decision of the Circuit Court of Appeals for the Seventh Circuit was subsequent to the decision here sought to be reviewed and is not yet final.

After respondents had prepared and had printed their brief in opposition to the petition for a writ of certiorari in this cause, they were served by petitioner with a sup-

plement to the petition for certiorari and a brief in support thereof.

The additional ground assigned as a basis for certiorari is that the decision sought to be reviewed is in conflict with the decision of the Court of Appeals for the Seventh Circuit, in the case of *The Carter Oil Company v. Welker*, handed down on November 6, 1939. It is apparent that the time for filing a motion for rehearing in that case has not yet expired and that the decision of the Court of Appeals for the Seventh Circuit may not be a final decision.

The decision here sought to be reviewed was handed down on August 29, 1939 (Tr. of R. 165), and the petition for rehearing was denied on September 26, 1939 (Tr. of R. 187). The decision in the *Welker* case was not handed down until November 6, 1939 (Supp. Pet. 2).

We respectfully submit that a comparison of the opinion in the present case with the opinion rendered by the Court of Appeals for the Seventh Circuit, in the case of *The Carter Oil Company v. Welker*, makes it very apparent that the Court of Appeals for the Eighth Circuit correctly followed the Illinois law of conveyancing, as well as the great weight of authority in other jurisdictions, and that the opinion in the present case is absolutely correct and that, if this Court should allow a certiorari, the judgment of the Court of Appeals for the Eighth Circuit would be affirmed.

In view of the fact that it is so plain that the law is correctly stated in the opinion in this present case, we feel that it is not inconceivable that, upon the filing of a petition for rehearing in the case of *The Carter Oil Company v. Welker*, the Court of Appeals for the Seventh Circuit will change its decision and hold that the deed in that case conveyed an easement and not a fee. Until the Court

of Appeals for the Seventh Circuit has passed upon the petition for a rehearing in the *Welker* case, or the time for filing such a petition has expired, no one can say that that Court will adhere to its present decision.

II.

The decision of the Circuit Court of Appeals for the Eighth Circuit, here sought to be reviewed, is not in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit, in the case of The Carter Oil Company v. Welker.

We contend most vigorously that the opinion of the Court of Appeals for the Eighth Circuit in this case is correct and that the decision of the Court of Appeals for the Seventh Circuit in the Welker case is incorrect. But, irrespective of that, the comments of the respective Circuit Courts of Appeal in both of these cases indicate clearly that the two courts recognized a difference in the deeds under consideration, and it is conceivable, therefore, that if the deed in the *Welker* case had used the same language as was used in the deeds in the present case, the Court of Appeals for the Seventh Circuit would have arrived at the same conclusion as was arrived at in the present case by the Court of Appeals for the Eighth Circuit.

In the *Welker* case the Court of Appeals for the Seventh Circuit held that the words "over and across," in the granting clause of the deed under consideration, refer to **the line** surveyed for the railroad track and **not to the land**, as in the present case. For the convenience of this Court, we briefly set forth the provisions of the deeds.

In the *Welker* case the granting clause was as follows:

"does hereby convey and warrant to Eastern Illinois

and Peoria Railroad Company, * * *, as and for its right of way, a strip of land One Hundred (100) feet wide, being Fifty (50) feet wide on each side of a line that has been surveyed and located across and upon the following described real estate, to-wit: Over and across the Northeast ¼ of the Northwest ¼ of Section Eighteen (18) Township Seven (7) North Range Three (3) East of the 3rd P. M. containing in all Three and Thirty-four Hundredths acres more or less" (Supp. Pet. and Br. 8).

The Court of Appeals for the Seventh Circuit, in commenting thereon, said:

"We do not agree with appellant's contention that the words 'over and across' written in longhand in the deed limited the conveyance to an easement. We think the words 'over and across' refer only to the surveyed line by which the exact location of the land was to be determined" (Supp. Pet. and Br. 13).

In the present case, the first deed conveyed:

"A strip of land for right of way for said railroad company sixty feet wide over and across the southwest quarter (¼) of the northeast quarter (¼) of section twenty (20)" (Tr. of R. 167).

And the granting clauses of the other two deeds in this case were substantially the same (Tr. of R. 167).

The Court of Appeals for the Eighth Circuit, in commenting upon the right-of-way deeds in this present case, said:

"Counsel for appellee argue that the words 'over and across' as used in the deeds, are descriptive of the words 'right of way,' and the words 'right of way' are descriptive of location by reference to the intended use of the 'strip of ground' to be conveyed. In this we think they err. The words 'over and across' are descriptive of the location of the 'strip of

ground,' and the words 'for right of way' describe the use or easement, that is, the estate intended to be conveyed. No other view can be reconciled with the language of the Rusler deed where there is added to the description the words, 'it being the strip of land over and across said above described tracts of land where the said Railroad is now located.' The Rusler deed was executed in 1898 and the other two in 1896. Apparently the railroad had not been located when the earlier deeds were made, but we perceive no sound reason why they should be construed differently" (Tr. of R. 176-177).

Therefore, as the deed in the case passed upon by the Court of Appeals for the Seventh Circuit, grants the following:

"as and for its right of way, a strip of land one hundred (100) feet wide, being fifty (50) feet wide on each side of a **line** that has been surveyed, and located across and upon * * *,"

and as the deeds in the present case grant the following:

"A strip of land for right of way for said railroad company sixty feet wide over and across, * * * *,"

it is apparent that the deeds are quite different. Consequently, the Court of Appeals for the Seventh Circuit might well have held in accord with the decision of the Court of Appeals for the Eighth Circuit had the wording of the deed involved in the *Welker* case been the same as the wording of the deeds in this case.

CONCLUSION.

Respondents respectfully submit that a writ of certiorari should not be issued in this case, first, because the decision of the Court of Appeals for the Eighth Circuit in this case is correct; second, because that decision is not in

conflict with the decision of the Court of Appeals for the Seventh Circuit in the *Welker* case, and, third, because of all of the grounds urged by respondents in their original brief herein.

Respectfully submitted,

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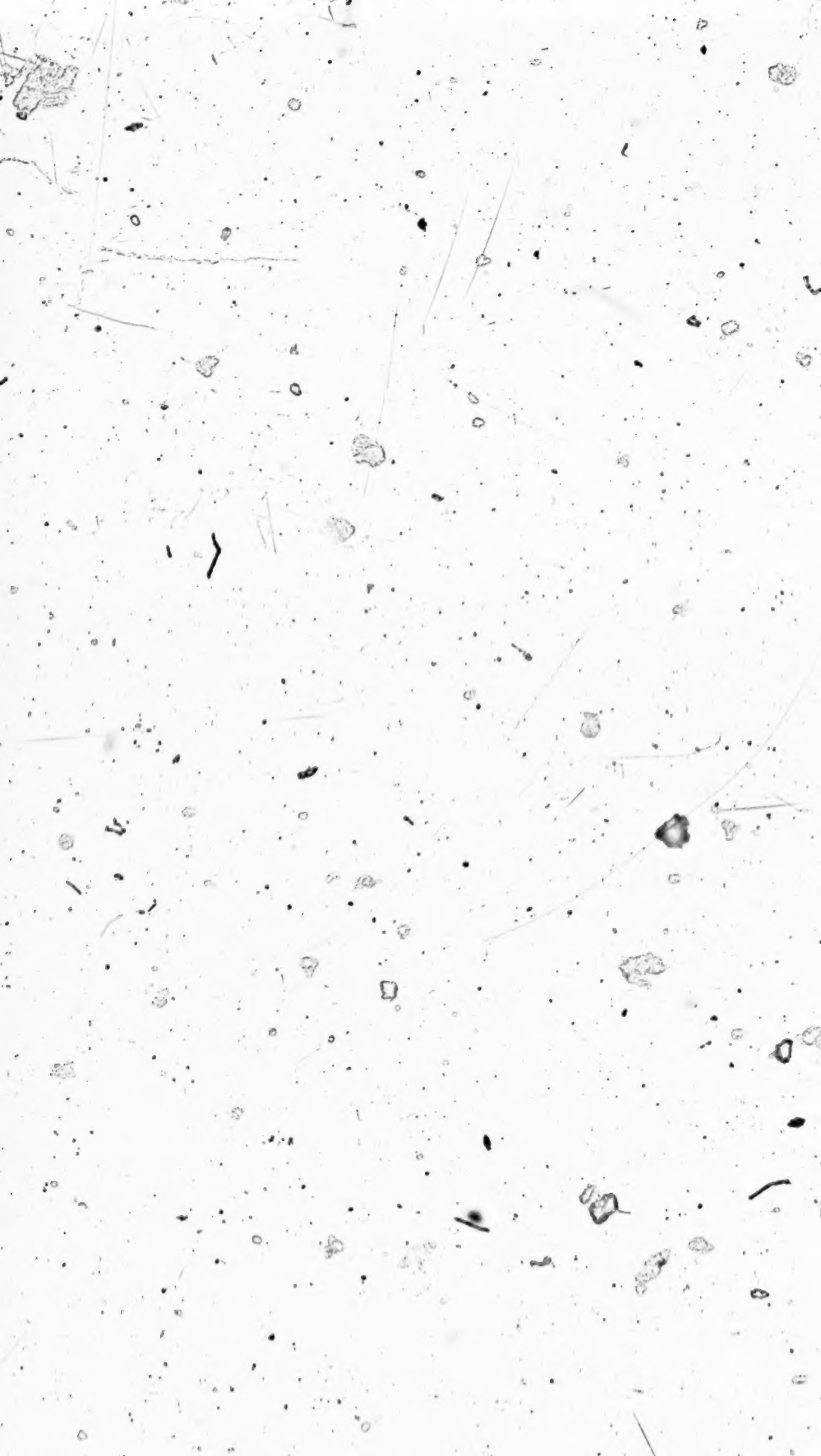

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 481

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 481

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

BRIEF OF RESPONDENTS

JURISDICTION.

Respondents Respectfully Suggest that the Writ of Certiorari Was Improvidently Granted and Should Be Dismissed for the Following Reasons:

(a). There are no matters of general importance respecting the jurisdiction of the Bankruptcy Court involved. That Court had no jurisdiction, without consent of the parties, to adjudicate adverse claims to the title to prop-

erty, which was not in the actual or constructive possession of the Trustee. The decision of the Court of Appeals is in accord with such decisions of this Court as *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox, et al.*, 264 U. S. 426.

(b) The decision sought to be reviewed is not in direct conflict with the decision of the Court of Appeals of the Seventh Circuit, handed down November 6th, 1939, in *Carter Oil Co.* v. *Welker, et al., which decision is not final, as petition for rehearing is still pending.* Even if it were in conflict therewith, such conflict, without more, would not justify this Court in taking jurisdiction. (*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202-206.)

(c) The decision sought to be reviewed is not in direct conflict with authoritative decisions of the Supreme Court of Illinois with respect to the conveyance of a strip of land in Illinois for use as a railroad right of way because the Courts of Appeal of both the Seventh and Eighth Circuits point out in their respective opinions that no case has been decided by the Illinois Court where the granting clause is identical with that in the deeds here involved.

(d) The decision sought to be reviewed in its interpretation of the words "over and across", as used in such a conveyance, is not in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Kynerd* v. *Hulen*, 5 Fed. (2d) (C. C. A. 5th) 160-162, as the deed in that case did not purport to convey a strip of ground for a right of way for said railroad, and the words "over and across" referred to the railroad track and not to the land granted. Even if it were in conflict therewith, such conflict, without more, would not justify this Court in taking jurisdiction. (*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202-206.)

(e) Under such circumstances this Court in the exercise of its discretion, of its own motion in many cases,

after submission of the case on briefs and arguments, has dismissed the writ of certiorari as being improvidently granted. (*Washington Fidelity National Ins. Co.* v. *Burton*, 287 U. S. 97-101, 102; *Layne & Bowler Corporation* v. *Western Well Works, Inc. et al.*, 261 U. S. 387-392, 393; *Southern Power Co.* v. *North Carolina Public Service Co. et al.*, 263 U. S. 508-509; *Keller et al.* v. *Adams-Campbell Co., Inc. et al.*, 264 U. S. 314-319, 320; *United States* v. *Rimer et al.*, 220 U. S. 547-548.)

STATEMENT.

Respondents deem it necessary, on account of the inaccuracies and omissions in petitioner's statement, to make a brief additional statement in order to properly state the issues presented in this case.

This controversy arises in a summary proceeding under Section 77 of the Bankruptcy Act (11 U. S. C. A. Sec. 205), for the reorganization of the Missouri Pacific Railroad Co., Debtor, and Missouri-Illinois Railroad Co., Subsidiary Debtor.

The Trustee (petitioner herein) filed a petition with the Reorganization Court, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, which, in its essence, was a petition to quiet title to a part of the railroad right of way of the Subsidiary Debtor, Missouri-Illinois Railroad Company, located in Illinois.

The Trustee had succeeded to the title of the Subsidiary Debtor to the right of way which had been conveyed to predecessors of the Subsidiary Debtor by right of way deeds, two of which were dated in August, 1896, and one in January, 1898.

It was contended by the Trustee that these deeds conveyed to his predecessors in title the fee to the property in question. The granting clauses of these deeds are correctly set forth on pages 3 and 4 of petitioner's brief.

Respondents, who had served notice of their claim to the ownership of the oil and mineral rights in and underlying said premises (R. 2), were notified by registered mail of the filing of the petition, and directed to appear and be heard at the time of the presentation thereof. (R. 52-53)

Respondents appeared and filed answers to the Trustee's petition, contesting the jurisdiction of the Reorganization Court to adjudicate the question of title and to grant the Trustee the relief prayed for, on the ground that the deeds under which the Trustee claimed title conveyed no more than an easement or right of way for railroad purposes, and that they, by virtue of certain oil leases from the fee owners, were vested with title to all the oil and mineral rights under the right of way. They further challenged the jurisdiction of the Reorganization Court to grant the Trustee the requested power of a receiver *pendente lite* and the authority to drill on said right of way and to remove, conserve and market the oil and gas from said premises and out of the proceeds of the oil recovered to pay such expenses. (R. 35-51)

The Reorganization Court, after a hearing, found that the Trustee was in possession of and was vested with title to said oil and gas, and granted the Trustee all the relief prayed, vesting him with the powers of a receiver *pendente lite* without bond, and authorizing him to drill, market and sell the oil and to pay all expenses out of the proceeds thereof, and enjoining Respondents from asserting any rights or claims to the oil and gas other than in the reorganization proceedings and from interfering with the drilling of the wells and marketing the oil. (R. 52-57)

Upon appeal to the United States Circuit Court of Appeals of the Eighth Circuit that Court held, in accordance with the contentions of respondents, that said deeds granted only a right of way easement to the railroad company; therefore, it appeared on the face of the petition that the Trustee had no possession, actual or constructive, of the oil and gas rights, and that consequently the Court was without jurisdiction to enter the order. The case is reported in 106 Fed. (2d) 217, and the full opinion appears on pages 137-156 of the Record.

Petitioner has gone beyond the record in his statement that 13 oil wells have been drilled by petitioner on the right of way of the Missouri-Illinois Railroad Company through the Salem oil field under the orders of the Bankruptcy Court here involved and under similar orders respecting other portions of the right of way not directly involved here. Petitioner further states that, pending the appeal in this case, the money received from the sale of oil aggregated $472,000, that approximately $225,000 of that amount had been spent for drilling, producing and marketing said oil, and that the balance is impounded in a special account pending the further orders of the Bankruptcy Court.

These statements are confusing because many of the wells referred to were drilled on parts of the right of way not involved here.

This money evidently represents the proceeds of oil produced from all of said wells and is money to which respondents and others may be entitled. Petitioner's experts testified that, in their opinion, there were only about 10,000 barrels of oil per acre beneath the 8 acres covered by the right of way across the land described in the deeds set out in Trustee's petition in the Bankruptcy Court. This would amount to approximately 80,000 barrels of oil

and would have a value of approximately $80,000. The experts further testified that, because wells on the right of way would drain oil from the surrounding territory, Trustee might expect to recover approximately 400,000 barrels of oil. (R. 109-111) This drainage to the right of way here involved is from land under lease to respondents. The right of way acreage here involved is only a part of the property covered by the oil and gas leases owned by respondents.

The order of the Bankruptcy Court contemplates that, even if Trustee is unsuccessful in establishing the fee simple title claimed by him, these funds, being the property of respondents and others, may be used to pay the cost of drilling, producing and selling the oil which belonged to respondents and others.

SUMMARY OF ARGUMENT.

I.

The writ of certiorari was improvidently granted and should be dismissed.

(a) A conflict between Circuit Courts of Appeals on questions controlled by State law is not of itself a reason for granting the writ of certiorari.

(b) The decision sought to be reviewed is not in direct conflict with authoritative decisions of the Supreme Court of Illinois.

(c) The Bankruptcy Court had no jurisdiction, without consent of the parties, to adjudicate claims to the title to the property which was not in the actual or constructive possession of the Trustee or to enter a preliminary order granting the Trustee powers of a receiver *pendente lite* and authorizing him to drill oil wells upon the premises and pay for same out of the proceeds of the oil recovered therefrom.

(d) Where this Court finds, after submission of the case on briefs and arguments, that the writ of certiorari should not have been granted, said writ will be dismissed by the Court on its own motion as having been improvidently granted.

II.

The conveyances to the Centralia and Chester Railroad Company of strips of ground "for right of way" "over and across" certain described real estate where said railroad is now located do not convey the fee but only convey an easement for railroad right of way purposes, so that no right to take oil and gas from under the strips of land passed to the railroad under said conveyances.

(a) The deeds in question do not convey a fee simple under Section 12 of the Illinois Conveyancing Act, because a less estate appears to have been granted and conveyed thereby by construction or operation of law.

(b) Where words of inheritance are not used in a deed, every word, clause or term must be given weight in determining the estate granted, rejecting none as meaningless or surplusage.

(c) In construing instruments of this character, Courts will look to the object to be attained in order to ascertain and give effect to the intention of the parties, and where an easement in land is conveyed which may well co-exist and be enjoyed and used by grantee consistently with ownership of the fee in grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed.

(d) The use of the words, "a strip of ground," "for right of way for said Company," "over and across" show the expressed intent to convey only an easement and not a fee.

(e) The grant of a right of way to a railroad company does not convey a fee in the land, but conveys an easement only.

(f) The decision of the District Court and the Circuit

Court of Appeals of the Seventh Circuit in the case of *Carter Oil Co.* v. *Welker* is contrary to the Illinois authorities and the overwhelming weight of authority in other jurisdictions.

(g) The Illinois cases involving the question of whether certain language constituted a condition subsequent or restrictive covenant and as to whether the property would revert on condition broken are not applicable to the issue here presented as to whether the deeds convey a fee or an easement.

(h) Where gores or strips across land are conveyed, public policy favors the construction that an easement only is conveyed.

(i) The Circuit Court of Appeals of the Eighth Circuit, in the absence of a controlling decision of the Supreme Court of Illinois, applied the Illinois rules of conveyancing and also followed the great weight of authority in other jurisdictions holding that conveyances containing like granting clauses convey only an easement and not the fee.

III.

These deeds do not convey a base or determinable fee because there is no condition or limitation on the grant of a fee therein but only a description of the estate granted, which is an easement.

IV.

If it be held that the deeds conveyed only an easement, so that the Trustee had neither actual nor constructive possession of the oil underlying the right of way, then the Bankruptcy Court had no jurisdiction to authorize the Trustee to drill wells on the right of way and pay the cost of same out of the oil produced, but the entire order and all its terms were void.

ARGUMENT.

MAY IT PLEASE THE COURT:

I.

Respondents respectfully suggest that the writ of certiorari was improvidently granted in this cause.

The supervisory jurisdiction of this Court, under Section 240 of the Judicial Code (Title 28, Section 347 U. S. Code), differs from the jurisdiction exercised upon appeal in its underlying purpose. Under well-established principles, the power of this Court in granting writs of certiorari is to be exercised sparingly and only in cases of gravity and general importance, or to secure uniformity of decision. (Rule 38, Rules of Supreme Court.)

A study of petitioner's brief inevitably raises the question as to whether or not the writ herein was improvidently granted in the first instance. This question is particularly pertinent in the light of this Court's holding in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202-206, that a conflict between circuits on questions controlled by state law is not of itself a reason for granting the writ.

Respondents believe that it is apparent that petitioner's brief sets forth no basis for issuing the writ within the meaning of the rules of this Court and that in practical effect the writ is serving no other purpose than to grant petitioner a second appeal in the same cause.

Respondents raise this question because under established authority of this Court under such circumstances the writ will be dismissed by the Court. (*Washington*

Fidelity National Ins. Co. v. *Burton*, 287 U. S. 97-101, 102; *Layne & Bowler Corporation* v. *Western Well Works, Inc. et al.*, 261 U. S. 387-392, 393; *Southern Power Co.* v. *North Carolina Public Service Co. et al.*, 263 U. S. 508-509; *Keller et al.* v. *Adams-Campbell Co., Inc. et al.*, 264 U. S. 314-319, 320; *United States* v. *Rimer et al.*, 220 U. S. 547-548.)

The determinative question in this cause, as appears from the statement of facts and record, is a question to be determined under the local law of the State of Illinois. It involves a construction of deeds executed and delivered in Illinois relating to property situated in that state. The petitioner contends that the proper construction of these deeds vests fee simple title to the property involved in the petitioner's predecessor in title. The respondents contend that the proper construction of these deeds is that they granted only an easement for a railroad right of way to petitioner's predecessor in title.

The petitioner's choice of the forum, by his institution of the summary proceedings in the reorganization of the Missouri Pacific Railroad Company in the United States District Court in Missouri, resulted in the ultimate determination of this question by the United States Circuit Court of Appeals for the Eighth Circuit.

In addressing itself to this problem, the Court below used the following criterion (R. 145):

> "Counsel for the parties agree that since the land in question is situated in Illinois the construction of the deeds is controlled by the laws of that state. *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202; *Benedict* v. *Ratner*, 268 U. S. 353; 359; *Buford* v. *Kerr*, 8 Cir., 90 F. 513, 514. *No Illinois decision has been found in which a deed or other conveyance has been construed where the granting clause is identical with that found in the deeds under consideration.* Under these circumstances we have no choice but to analyze the issues for

> ourselves, exercising an independent judgment with respect to the issues presented, aided by and with deference to the Illinois law of conveyancing." (Italics ours.)

The foregoing method of approach is in accord with established judicial precedent under such circumstances and is not subject to criticism. It was contended below by appellee, petitioner here, that a decision of the United States District Court for the Eastern Judicial District of Illinois in the case of *Carter Oil Co.* v. *Welker*, 24 Fed. Supp. 753, also involving a railroad right of way deed, was parallel on its facts and should be controlling on the Court of Appeals in reaching its decision. It was recognized by the Court of Appeals for the Eighth Circuit that a decision of the Federal courts on a question of local law, which had not previously been determined by the courts of the state, was not binding either upon the courts of the state involved or on other Federal courts, hence the Court of Appeals did not consider itself bound by the *Welker* case.

Without deciding that the *Welker* case was parallel on its facts, which both the Court of Appeals and respondents question, the Court below nevertheless gave that opinion due consideration as appears from this language in its opinion (R. 154):

> "We are not unmindful that in construing *a deed somewhat similar* to the deeds involved in this case the District Court of Illinois in *Carter Oil Co.* v. *Welker*, 24 F. Supp. 753, reached the conclusion that the deed vested a fee simple title in the railroad company, and not an easement. While that decision commands great respect, insofar as it is inconsistent, *if at all*, with the views herein expressed, we are not inclined to follow it." (Italics ours)

The opinion of the Circuit Court of Appeals in this respect is also in accord with orderly procedure and judicial precedent under such circumstances.

Subsequent to the decision of the Court of Appeals in this cause and after the motion for rehearing had been overruled and disposed of, and even after petition for certiorari had been filed in this Court, the United States Circuit Court of Appeals for the Seventh Circuit handed down its decision in the case of the *Carter Oil Co.* v. *Welker et al.*, affirming the decision of the District Court of Illinois. *A motion for rehearing in that cause has been filed and is yet undisposed of.*

Even assuming the cases are in conflict, which respondents deny, both involve questions of local law upon which there is no controlling decision of the Illinois state courts. This was recognized in the opinions of both the Eighth Circuit and the Seventh Circuit. The finding of the Eighth Circuit on this question in *Magnolia Petroleum Co.* v. *Thompson, et al.*, 106 Fed. (2nd) 217 (R. 145) is set out above. The finding of the Seventh Circuit in *Carter Oil Co.* v. *Welker, et al.* (Petitioner's Br., p. 46), is as follows:

> "Whether the particular form of deed here involved results in the creation of a fee simple interest in the grantee or only an easement *has never been determined by the Illinois Courts so far as we can find.*" (Italics ours)

Under such circumstances even the decision of this Court as to the question of local law involved will not be binding on the courts of Illinois. They alone, under our system, have the authority to declare the law of their state relating to real estate and the Federal courts have felt bound to follow their decisions even from an early day. *Suydam* v. *Williamson*, 24 How. (U. S.) 427. "No decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts." *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202-206.

It would seem, therefore, that the writ of certiorari had been improvidently issued in this cause under the ruling of this Court in that case. Although the *Ruhlin* case involved a question of commercial law and the decision is a corollary to the decision of this Court in *Erie Railroad Co.* v. *Thompkins,* 304 U. S. 64, the holding of this Court in that case is equally applicable to the present cause in that even prior to the decision of the *Erie* case there has never been any question since an early date but that the Federal courts would follow state decisions on questions of local law.

The foregoing is also an answer to a somewhat minor contention of petitioner that the decision sought to be reviewed is in conflict with a decision of the Fifth Circuit in the case of *Kynerd* v. *Hulen,* 5 Fed. (2d) 160, which case also involved a question of the local law of the State of Texas.

As the Courts of Appeals of both the Seventh and Eighth Circuits have held there is no controlling Illinois decision construing deeds with similar granting clauses, there can be no conflict with "a long line of authoritative decisions of the Supreme Court of Illinois" (Pet. Br. 2), as petitioner contends. (Pet. Br. 16) The authorities there cited by petitioner deal with another field of Illinois property law, that is, the question of whether or not an admittedly granted fee is limited by other language in the deed. These cases are completely distinguishable from the issue involved in this case. (See pp. 32-36, this brief.) It, therefore, follows under the issues urged by petitioner, the only other conceivable basis of certiorari is that the Court below in its decision reached a conclusion contrary to prior rulings of this Court as they relate to the Bankruptcy Act.

Petitioner's contention in this respect is founded upon

the decision of this Court in *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox et al.*, 264 U. S. 426. (Pet. Specification of Errors, brief, pp. 7, 8)

The burden of petitioner's contention seems to be that the Court of Appeals erred in failing to hold that the Bankruptcy Court had jurisdiction as a preliminary inquiry to determine the question of possession on which its jurisdiction to determine the ultimate merits of the controversy depended. (Petitioner's brief, p. 7, and part II of petitioner's argument, pp. 34, 40)

In this contention petitioner is clearly in error as is established by the record below.

Petitioner of his own volition instituted this proceeding in the District Court as a summary proceeding in the reorganization of the debtor railroad company. Respondents were notified by registered mail of the filing of the summary petition and that the Trustee claimed title to all of the oil underlying the subsidiary debtor's railroad right of way in the property involved, which was also claimed by respondents under oil and gas leases.

All parties recognized that the jurisdiction of the Bankruptcy Court as to the adverse claims asserted depended upon the Trustee being in actual or constructive possession of the property in controversy, namely the oil and gas underlying the right of way. This is the extent of the Bankruptcy Court's summary jurisdiction as directly ruled by this Court in *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox et al.*, 264 U. S. 426-433.

The Trustee's claim to possession was dependent upon the construction of the deeds to Trustee's predecessor in title. If they conveyed a fee, then it followed that the Trustee had actual or constructive possession. The basis of the claim, that is the granting clauses of the deeds, were set out in Trustee's petition. (R. 3-4)

The answer of respondents in the District Court appropriately put in issue the jurisdictional question. See a summary of these answers in the opinion of the Court of Appeals, 106 Fed. (2d) 217. (R. 140-141)

It was thoroughly understood by all parties at the time of the hearing in the District Court that the proper construction of the deeds appearing on the face of the petition would be determinative of the Court's jurisdiction. Counsel for petitioner so advised the Court. (R. 100-102) This was also summarized by the Court of Appeals in its opinion. (R. 141-142)

The Court of Appeals then concluded (R. 143):

> "The first question presented upon this appeal, as it was the first question for the determination of the court below, relates to the jurisdiction of the District Court as a Court of Bankruptcy to determine in a summary proceeding the adverse claims to the fee title to the land underlying the railroad right of way in which the oil deposits are found."

It follows, therefore, on the record that the District Court did have an opportunity to decide in the first instance its jurisdiction to entertain the proceedings. Under the issues the determination of this question also determined the merits of the controversy since that question was dependent upon a construction of the deeds.

The Court of Appeals in its opinion found that the District Court determined the question of its jurisdiction erroneously from facts appearing on the face of the petition, namely, the granting clauses of the deeds involved. The Court of Appeals properly ruled that since the lower court had erroneously determined its jurisdiction and had none to entertain the cause, because the Trustee was neither actually or constructively in possession of the oil and gas underlying the right of way, then it necessarily

followed that all of the orders and findings as well as the decision of the District Court were null and void.

Respondents respectfully suggest that the issuance of a writ of certiorari in this case was unwarranted in that the Court below, in reaching its decision, carefully and meticulously followed judicial precedent relating to the Bankruptcy Act. Further, assuming that the decision in this case is in conflict with the decision of the Seventh Circuit in *Carter Oil Co.* v. *Welker,* certiorari is unjustified because both decisions relate to a question of local law undetermined by the courts of Illinois.

Under such circumstances this Court in its discretion may dismiss the writ of certiorari as improvidently granted.

Respondents respectfully suggest that it is important that this Court do so for the reasons assigned by this Court in the case of *Layne & Bowler Corp.* v. *Western Well Works, Inc.* 261 U. S. 387-392, 393, and pointed out in the case of *Washington Fidelity National Ins. Co.* v. *Burton,* 287 U. S. 97-101, in the following language:

> "It thus appears that the construction of the statute which we were asked to review is not in the case, and, even if it were, it is of local significance only. The conflict of decisions asserted is not shown. Plainly the question is not of such general interest or importance as under the rules and practice of this Court warrants its review upon certiorari. For these reasons, it is the duty of this court to dismiss the writ as improvidently granted."

However, if this Court is not disposed to dismiss the writ of certiorari and decides to review the opinion of the lower court, respondents believe that they can satisfactorily demonstrate to this Court that the decision of the Court below was proper.

II.

The deeds conveying "a strip of ground for right of way for said company * * * over and across" the real estate described, granted only an easement for railroad purposes and conveyed no interest in or to the minerals, oil and gas underlying the same to the predecessors in title of petitioner.

If this court decides to review the decision below, the real question for decision is "What is the intention of the parties expressed in these particular deeds?" It is conceded by both the Courts of Appeals of the Seventh and Eighth Circuits that no case has been decided by the Supreme Court of Illinois where the granting clause is identical with that in these deeds. However, since the real estate in question is located in Illinois, the question of the meaning of these instruments must be determined by the Illinois law on the construction of deeds insofar as the same is applicable. As the deeds here under consideration are in the statutory form without words of inheritance, they must be construed with reference to the Illinois statutes and decisions pertaining to that form of conveyance.

Statutes and Applicable Rules of Construction.

Section 12 of the Illinois Conveyancing Act (Chapter 30, Par. 12, Ill. Rev. Stat. 1939) provides that every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law. (Br. 13)

Under this section, where words of inheritance are not used, but the deed is in the form provided by Section 8 of the Illinois Conveyancing Act (Chapter 30, Paragraph 8, Ill. Rev. Stat. 1939), and merely "conveys and warrants" to a specified grantee, without words of inheritance, the entire context of the deed must be considered, every word, clause or term must, if possible, be given weight in determining the estate granted, rejecting none as meaningless or surplusage, and a fee simple does not pass, if a less estate is limited by express words or appears to be granted by construction or operation of law (*Woods* v. *Seymour*, 350 Ill. 493-496, 183 N. E. 458; *Harder* v. *Mattheus*, 309 Ill. 548-554, 141 N. E. 442; *Bauman* v. *Stoller*, 235 Ill. 480-492, 85 N. E. 657.)

In the case of *Bear* v. *Millikin Trust Co.*, 336 Ill. 366-381, the same rule is announced in the following words:

> "In a deed in which words of inheritance are not used, the entire context of the instrument may be considered, and every word used, wherever found, must, if possible, be given weight in determining the estate granted."

In the deeds under consideration no words of inheritance are used and, therefore, it is imperative that every word, clause or term used must, if possible, be given weight in determining the estate granted, rejecting none as meaningless or surplusage.

In the case of *Waller* v. *Hildebrecht*, 295 Ill. 116-118, a warranty deed conveyed the east ten feet of lot 7 and the south ten feet of lot 6 "to be used as alley, only, in common by both parties hereto." In determining the meaning of said deed the Court said (page 121 of the opinion):

> "In construing instruments of the character of this warranty deed, the courts will look to the cir-

cumstances attending the transaction, the situation of the parties, the state of the thing granted and the object to be attained, to ascertain and give effect to the intention of the parties * * *.

"If this deed represents the whole transaction we are unable to understand the purpose of it. It seems clear, however, from the language of the deed, that no more interest was intended to be given in lot 6 than a *right of way* over the south ten feet of it. Generally speaking, where a particular or special right or easement in land is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass *because it is not essential to the right or interest which is described in the deed.* (19 Corpus Juris, 909)." (Italics ours.)

Here it is apparent that the object to be attained was the grant to the railroad of an easement or right of way over the land so a railroad could be operated thereon. This easement might well be enjoyed and used by the railroad consistently with the ownership of the fee in the grantors and, therefore, the fee did not pass because it was not essential to the right or interest described in the deeds. Petitioner fails to point out why the railroad needed the fee in order to build and operate a railroad over and across this land, and cannot do so.

It is not essential that express words of limitation be used if it appear by necessary implication that a less estate was granted. (*Lehndorf* v. *Cope*, 122 Ill. 317-327; *Hempstead* v. *Hempstead*, 285 Ill. 448-453.)

In the construction of deeds to which the Conveyancing Act is applicable, the primary object is to ascertain and give effect to the intention of the parties unless to do so will violate an established rule of property. (*Cover* v. *James*, 217 Ill. 309-313; *Bear* v. *Millikin Trust Co.*, 336 Ill. 366-381; *Woods* v. *Seymour*, 350 Ill. 493-496).

In ascertaining the intention of the parties, the courts are not confined to the strict and literal construction of the language used when to do so will frustrate the intention of the parties as gathered from the instrument. (*Kearney* v. *Kirkland*, 279 Ill. 516-524; *McCoy* v. *Fahrney*, 182 Ill. 60-64; *Bear* v. *Millikin Trust Co.*, 336 Ill. 366-380.)

A fee simple and a perpetual easement are both freeholds. (*Funston* v. *Hoffman*, 232 Ill. 360-363.)

This case can not be determined by the application of rules of property which fasten a specific import and meaning upon particular language employed in a deed and state arbitrarily the legal effect which such language will have, such as the application of the Rule in Shelley's Case, but must be decided by application of rules of construction of the language in the particular deed in the light of the circumstances under which it was made. By harmonizing all the language of these deeds in an attempt to arrive at their meaning by the application of generally accepted rules of construction, the intention of the parties as expressed in the language of these deeds, viewed in the light of all the surrounding circumstances, compels the conclusion that an easement only was granted thereby.

Application of these principles.

All of the conveyances to the Centralia & Chester Railroad Company, predecessor in title to the petitioner Trustee, contain substantially the same language. The first conveyance described in the petition is a "strip of ground for right of way for said company 60 feet wide over and across" certain described real estate. (R. 3) The other conveyances are the same except that deeds 2 and 3 use the words "for said railroad company" rather than "company." (R. 3-4) In the last deed, in addition

to the foregoing language, the following language appears after the description:

> "It being the strip of land over and across said above described tracts of land where the said railroad is now located." (R. 4)

The deeds also vary in that the second deed grants a strip 66 feet wide rather than 60 feet wide as in the others. Each deed is designated as a warranty deed.

It is the contention of the petitioner Trustee that these deeds convey a fee to the grantee and not an easement for railroad purposes. To so construe these deeds is to ignore the words *"a strip of ground," "for right of way for said Company," "over and across."*

Were these words idly used by the parties to the deed? Obviously not. If the parties intended to convey a fee simple absolute, these words were useless and meaningless. It is apparent that the expressed intent of these instruments was to convey only an easement. The railroad grantee obviously was not then bargaining for the fee. It needed only a right of way. It did not need the fee and had no intention of obtaining one. The question of the fee did not arise until after oil was discovered in the vicinity of the right of way. Then, and only then, did the successors in title look back to the deeds and decide that a fee had been conveyed. They are now attempting to get more from their grantors than they ever bargained for or intended to get.

The meaning of the parties to these deeds is rendered clear beyond question by the words "over and across." A deed intending to convey in fee a strip of ground out of a larger tract would never contain the words "over and across." Such a deed would describe merely a smaller part of the larger tract. A deed conveying a

small part out of a larger tract is not "over and across" said tract, but, on the contrary, is a conveyance of a smaller part thereof.

At the time these deeds were executed, as evidenced by the wording contained in the deeds, the parties were dealing with and bargaining "for a right of way." A right of way by its very nature, as the words indicate, is a right of passage "over and across" certain described real estate. The parties, to make doubly certain to express their intent, used in the deeds not only the term "right of way," but the words "over and across." When the words "over and across" are used in conjunction with what the parties were dealing with, namely, a right of way or right of passage, it is apparent that they expressed in clear, unambiguous words their meaning, that is, an easement, not a fee-simple title absolute.

Also in construing these deeds it is important to consider the position of the parties to these instruments. The grantors were farmers conveying a narrow strip across their farms. They undoubtedly had in mind, as expressed in the deeds, granting to the railroad an easement "over and across" their property so long as it was being used for railroad purposes. They doubtlessly never considered or intended to grant to the railroad the fee-simple ownership so that the railroad might turn the property to some use which might be detrimental to their own use of the property.

That this is important in the construction of railroad right of way deeds is pointed out in the case of *Abercrombie* v. *Simmons*, 71 Kans. 538, 81 Pac. 208, wherein the Court in its opinion (page 210) states:

> " * * * May a railroad company purchase a strip of land extending a great distance through the coun-

try and over many farms, abandon the enterprise, and then sell the strip to those who will put it to a wholly different use; one which might be both obnoxious and menacing to the adjoining owners?"

The Court in the above cited case answered the question in the negative, and this case and the thought therein expressed has been cited with approval by the Supreme Court of Illinois in *Branch* v. *Central Trust Company*, 320 Ill. 432, where the Court said on pages 440 to 442 of the opinion:

> "The grant to a railroad company of a right of way over, through and upon land described does not convey the fee to any part of the land described but only the right to use the land for railroad right of way purposes. * * *
>
> "These cases make it clear that in this State a grant of a right of way to a railroad company does not convey a fee in the land but conveys an easement, only * * *."

The words used in these deeds negative any intent on the part of the grantor to convey a fee simple absolute to the property in dispute. Any attempt to so construe the deeds does violence to the clearly expressed intent contained in the deeds. To so construe the deeds it would be necessary to entirely ignore these words "right of way" and the words "over and across." Such a construction would be contrary to every sound principle of construction and the decisions of the Supreme Court of Illinois.

The intention of the parties is further manifest by the use of words "over and across." Obviously, these words, as held by the Court below, modify the words "a strip of land." The parties, not having described the land conveyed by metes and bounds, met this deficiency by describing the land as a strip of land over and

across a certain section of property. If the words are not so employed, the grant is a nullity. To illustrate this contention, we take the granting clause and delete the words "over and across," as follows:

> "A strip of land for right of way for said railroad company sixty feet wide—the southwest quarter (1/4) of the northeast quarter (1/4) of Section Twenty (20), Town Two (2), North, Range Two (2) East of the Third Principal Meridian."

So deleted, the grant is meaningless.

Petitioner attempts to meet this dilemma by arguing that the words "over and across" modify the words "right of way" rather than the words "a strip of land." This also is a distinction without a difference. It seems obvious that the term "for a right of way over and across" is equally descriptive of the intent to convey an easement rather than a fee. However, speculation as to which words they modify is needless, in view of the manifest intent appearing from the final words in the Rusler deed (R. 3-4), which contains the following additional phrase:

> "It being the strip of land over and across said above described tracts of land where the said railroad is now located."

This, beyond peradventure of doubt, indicates that it was the intention of the parties in these deeds that the words should modify the words "a strip of land," and demonstrates the intention of the parties to convey no more than an easement.

The language quoted from the decision of the Court of Appeals in this case on page 31 of petitioner's Brief is a complete answer to this argument.

The case of *Kynerd* v. *Hulen*, 5 Fed. (2nd) (C. C. A. 5th) 160-162, is not in conflict with the decision of the

Court of Appeals, because in that case the deed did not anywhere purport to convey a right of way or a strip of ground for a right of way. It nowhere contained in the granting clause the language "for a right of way for said railroad company"? or any similar language, as is true of the deeds in the case at bar. Furthermore, the words "upon, over and across" in the deed before the Court in the *Kynerd* case referred to the railroad track and not to the land granted. The land granted was described by metes and bounds.

Also, the *Kynerd* case involved questions relating to real estate located in Texas. The Federal Courts have always followed the laws of the several States as to questions of title to real property. If there is a conflict between the Kynerd case and the instant case, which respondents do not admit, it may well be due to the difference between the conveyancing laws of the State of Illinois and those of the State of Texas.

The same is true of the case of *Brightwell v. I. G. N. Ry. Co.*, 121 Tex. 338, 49 S. W. (2nd) 437-440, also cited by petitioner. There, the granting clause did not purport to convey a strip of ground for right of way, and did not contain in the granting clause the language "for a right of way for said railroad company."

Petitioner, throughout his brief, derives great comfort out of repeatedly stating one isolated principle of construction frequently employed by the Courts of Illinois that in case of ambiguity a conveyance is to be construed in favor of the grantee and against the grantor. For example, see pages 15, 28 and 34 of petitioner's brief.

To put it another way, this is the boot strap by which petitioner attempts to extricate himself, in the course of his argument, from any unsatisfactory dilemma.

Whenever there is a controversy over the meaning of a written instrument, the question of construction arises; that is, the intention of the parties to the instrument under consideration must be determined. In the final analysis, all principles of construction are directed to the proper ascertainment of the intention of the parties. There is no magic in any such principles, and they may not be employed to arrive at a conclusion which is obviously contrary to the intention of the parties. If so, then the very purposes of the aids to construction are lost sight of and they are aids to injustice rather than justice.

Respondents' contention that these deeds conveyed no more than an easement for railroad purposes gives force and effect to every word contained in the deeds, carries out the expressed intent of the parties, and gives to the grantees that which they bargained for. This construction, therefore, is in accord with sound principles of construction supported by the great weight of judicial authority, including Illinois.

Illinois Cases on Right of Way Deeds.

Railroad right of way deeds have been a fruitful source of litigation in every jurisdiction in the United States. Illinois, where the property in question is located, is no exception. The Courts of last resort of that State have unanimously ruled that a deed granting a right of way to a railroad grants to the railroad only an easement for railroad purposes rather than a fee.

In the following cases involving railroad right of way deeds, the Illinois courts held that the railroad acquired an easement rather than a fee-simple title. The deeds involved in these cases use less strong language of an

intent to convey less than the fee than the deeds here under consideration.

In the case of *Wiggins Ferry Co.* v. *O. & M. Ry. Co.*, 94 Ill. 83-92, a conveyance of "the right to construct, maintain and use, in, through, upon and over" certain lands, railroad tracks, was held to create only an easement.

In the case of *I. C. R. R. Co.* v. *Houghton*, 126 Ill. 233-236, 18 N. E. 301, the deed conveyed a right of way "over and through" a certain tract for the purpose of constructing a railroad, "to have and to hold the same to the plaintiff and its successors and assigns forever, for all lawful uses and purposes incident to a full and indefeasible title in fee simple," and it was held that even with such language in the habendum clause the railroad acquired only an easement.

In the case of *I. C. R. R. Co.* v. *O'Connor*, 154 Ill. 550, 39 N. E. 563, the conveyance to the railroad contained the same language as that in the Houghton case, *supra*. The Court cited the Houghton case with approval and arrived at the same result.

In the case of *Walker* v. *I. C. R. R. Co.*, 215 Ill. 610-612, 613, 74 N. E. 812, for a recited consideration of $21,310.00, the grantee "* * *" does grant, bargain, sell" to the railroad company and "their successors and assigns, for the purpose of constructing, maintaining and operating thereon" a railroad, "the right of way for the same over and through" certain tracts of land, "to have and to hold the same unto the said Illinois Central Railroad Co., their successors and assigns forever. * * *" The Court in that case held that such language evidenced an intent to convey an easement rather than a fee to the railroad.

In the later case of *Branch* v. *Central Trust Co.*, 320 Ill. 432-440, 151 N. E. 284, the Court, summarizing the Illinois law on the subject, ruled:

> "The grant to a railroad company of a right of way *over, through and upon land described does not convey the fee to any part of the land described, but only the right to use the land for railroad right of way purposes.*" (Italics ours.)

After reviewing the Illinois authorities the Court in this case further rules, on page 442:

> "These cases make it clear that in this state *a grant of a right of way to a railroad company does not convey a fee in the land, but conveys an easement only;* and the same view has been expressed by the courts of other jurisdictions. (Citing authorities.) *A conveyance of land by general warranty deed to a railroad company for railroad purposes was held in Chouteau* v. *Missouri Pacific Railroad Co.*, 122 Mo. 375, *not to convey a fee*, and a deed of general warranty which by its language purported to convey to a railroad company land described as 'all the lands in the southwest quarter of section 13, township 9, south of range 7 west, lying within 50 feet of the center line of the main track of said railroad,' without any reference to the purpose of the conveyance or the use of the land, was construed by the Supreme Court of Kansas as conveying an easement, only, where it appeared that the railroad company had surveyed and staked out the line for its railroad and when about to begin the construction of the railroad over the grantor's land purchased from him the strip of land 100 feet wide running through the quarter section (*Abercrombie* v. *Simmons*, 71 Kan. 538). (Italics ours.)
>
> "Section 13 of Article II of the Constitution provides that the fee of land taken for railroad tracks without consent of the owners thereof shall remain in such owners subject to the use for which it is taken. The easement acquired by the railroad company ceases upon abandonment by the company, and

the owner of the fee, or his heirs or grantees, may recover by ejectment the possession of the land in which the right of way had existed (*Chicago and Eastern Illinois Railroad Co.* v. *Clapp*, 201 Ill. 418). The Constitution, the statute and the courts recognize the existence of the fee in the original owner and of the easement in the railroad company, and if this is the nature of estates where the right of way is acquired by condemnation, there is no reason why the parties may not by contract create the same estates. This is what was done by the Mandell deed."

If, as held in the above cases, the words "A right of way upon" or a "right of way over and through" are construed to convey an easement rather than a fee, then it follows that the language employed in these deeds, namely, "for a right of way for said company over and across" must be similarly construed. There is no difference in the meaning between the phrases or in the intent which they express.

Petitioner recognizes the force of these authorities. At page 22 of his brief, *et seq.*, it is conceded that under Illinois law "the conveyance of a right of way is the conveyance of an easement." To meet this situation, it is argued that a distinction exists between the conveyance of "a right of way" and the conveyance of land "for a right of way over and across property." Petitioner admits that the former conveys an easement, and argues that the latter language conveys a fee. Respondents submit that any purported distinction is a distinction without substance, is a play on words, and is not sufficiently substantial upon which to base the determination of the ownership of valuable rights in property. In the final analysis, the validity of such a distinction must depend upon whether or not the difference in the language indicates a difference in the intention of the parties to the

instrument. It seems clear without argument that the intention of the parties is the same in either case. The parties in either case are dealing with a right of passage across property and not with the fee thereto.

That there is no substantial distinction between the conveyance of "a right of way" which petitioner concedes to be a conveyance of an easement and the conveyance of land "for a right of way over and across property," is established in principle, by the following cases of Illinois.

In *Sullivan* v. *Eddy*, 154 Ill. 199-204, the Supreme Court held that the *reservation of*:

> "*A strip* two rods wide off from the north and west side of said premises for *a street.*" (Italics ours.)

reserved to the grantor only as easement. The same result would have followed if the Court had had before it a deed *granting*:

> "A strip two rods wide off of the north and west side of said premises for a street."

As was pointed out in the case of *Garrison* v. *Rudd*, 19 Ill. 558, the principle of construction is the same whether the interest arose by way of reservation or by way of a grant. The Court in that case rules (p. 564):

> "A right of way claimed by *express reservation* in a deed, as in this case, is subject to the same construction as in the case of an *express grant*, for what will pass by words in a grant will be excepted by like words, in an exception. Sheppard's Touchstone, 100." (Italics ours.)

The foregoing cases, if not directly, at least by analogy, hold that a conveyance of land "for a street" creates only an easement and is not a conveyance of the fee. By parity of reasoning, the same result must follow if the conveyance is "for a right of way."

Under established judicial precedent in Illinois as to the construction of right of way deeds, it is undisputably clear that the deeds here in question conveyed to petitioner's predecessor in title no more than an easement. The attempt of petitioner to develop a distinction between a conveyance "of a right of way" and a conveyance "for a right of way" is artificial to the extreme and the only semblance of judicial support therefor is the Welker case, the decision in which is not yet final.

Petitioner's Cases Considered and Distinguished.

Petitioner relies to a great extent upon the decision of the District Court for the Eastern District of Illinois in the case of *Carter Oil Co. v. Welker*, 24 Fed. Supp. 753, and the decision of the United States Circuit Court of Appeals for the Seventh Circuit handed down on November 6th, 1939, which affirms the decision of the District Court. However, *that case is still pending on petition for rehearing in the Circuit Court of Appeals of the Seventh Circuit, and the decision is not final.* Therefore, it can be given no weight as an authoritative decision of the Circuit Court of Appeals of the Seventh Circuit.

The comments of the respective Circuit Courts of Appeals in this case and in the Welker case indicate that the two Courts thought that there might be a difference in the deeds under consideration, and it is conceivable, therefore, that if the deed in the Welker case had used the same language as was used in the deeds in the present case, the Court of Appeals for the Seventh Circuit would have arrived at the same conclusion as was arrived at in the present case by the Court of Appeals for the Eighth Circuit.

In the Welker case, the Court of Appeals for the Seventh Circuit held that the words "over and across" in the granting clause of the deed under consideration refer to *the line* surveyed for the railroad track, and *not to the land*, as in the present case: (Br. 49) The Court of Appeals for the Eighth Circuit, however, said that in this case the words "over and across" are descriptive of the location of the strip of ground. (R. 148-149) These different holdings might result from the different language of the deeds in the two cases. (R. 3; 4) (Br. 44) Consequently, the Court of Appeals of the Seventh Circuit might well have held in accord with the decision of the Court of Appeals of the Eighth Circuit had the wording of the deed involved in the Welker case been the same as the wording of the deeds in this case.

But even if there is no such valid distinction between the deeds involved in these cases, the decision in the Welker case is out of harmony with the Illinois authorities.

The first case relied on by petitioner and cited by the District Court in support of the ruling in the Welker case is that of *Supervisors of Warren County* v. *Patterson*, 56 Ill. 111, which concerned a contract by which it was agreed to sell a tract of land to Warren County for court house and other county buildings, and a deed was executed in performance of this contract. The Court said that the only question in the case was as to the power of the authorities of a county to sell land which may have been purchased for the purpose of erecting thereon county buildings, and held in substance that the words "for court house" etc., did not create a condition nor limitation on the power of alienation. *The question of whether or not a conveyance conveys an easement or conveys the fee simple is in no way involved.*

The next case is *Tinker* v. *Forbes*, 136 Ill. 221, 26 N. E. 503, where a deed granted an interest in the grantor's waterpower on Rock River and, for the purpose of locating proper water wheels and races to draw said water, the east half of lot 9 in the south block. The deed further provided that no building was to be erected or business carried on on said half-lot that should materially increase the fire exposure or that should darken any light within three feet of the west line of said half-lot. In an injunction suit to restrain the erection of a building on said half-lot, the Court said that said words with reference to purpose did not constitute a condition, as there was no provision for re-entry for condition broken, nor were there any words which constituted a covenant. The Court held that in determining what restrictions the grantor intended to place upon the use of said half-lot all of these clauses must be construed together and that it was clear from all of said provisions that the parties contemplated the erection of a building on said half-lot subject to the limitations expressed. The Court reversed the case, saying that the defendant should be required to show whether his proposed building would violate the covenants. *No question of whether or not an instrument conveyed an easement or a fee simple was even remotely involved.*

The case of *Downen* v. *Rayburn*, 214 Ill. 342, 73 N. E. 364, is relied upon. In that case the conveyance was of a certain tract of land to be used as a church location together with all and singular the hereditaments and appurtenances thereunto belonging or in any way appertaining to have and to hold the said premises as above described with the appurtenances unto the said party of the second part and their successors in office forever. The Court held that a title in fee was conveyed under

the habendum clause and that the words "to be used as a church location" did not operate as a condition subsequent, saying that where real property is conveyed in fee, restrictions on its use are not favored, and that when the words "upon condition" are not used and there is no provision for re-entry, there is nothing to indicate any intention to create a condition subsequent. The Court further observed that a subsequent condition is one which operates upon an estate already created and vested and renders it liable to be defeated. *The question of what kind of conveyance constitutes the grant of an easement is not mentioned.*

The District Court then cites *Noyes* v. *St. Louis, A. & T. H. R. R. Co.* 21 N. E. (Ill.) 487, (not officially reported) but inadvertently misstates the facts, and, consequently, misconstrues the ruling in that case. The District Court says that in the Noyes case, plaintiff conveyed to a railroad company by warranty deed "for right of way" a strip of land 100 feet in width, and that thereafter in the same instrument it was recited that the above tract is granted for the erection of a freight house and other general railroad purposes. The facts in the Noyes case are that Noyes by warranty deed conveyed to the Illinois Central Railroad, for right of way, a strip of land 100 feet in width, and also to the Illinois Central Railroad and Terre Haute, Alton and St. Louis Railroad Company jointly a strip of land on the south side of the main track of the railroad, containing 20 acres, and it was to the 20 acre tract that the use for general railroad purposes referred, and not to the strip of land for a right of way. The suit concerned the 20 acre tract alone, and *no construction of that portion of the deed conveying a strip of land 100 feet in width for a right of way was in any way involved. There was no*

question of the conveyance of an easement involved or discussed. The sole question was whether the grant of the 20 acres was subject to a condition subsequent, or created a determinable fee. The Court held that the deed created no condition subsequent either expressly or by implication, and that in truth the company was not required to do anything, and even if the grant should be construed as conditional, *there was no proof of such a substantial failure to perform as would justify* the setting aside of the deed.

These four Illinois cases, upon which the District Court principally relied in the Welker case and upon which petitioner strongly relies here, are all cases involving the question of whether certain language constituted a condition subsequent, so that the property would revert to the grantor on condition broken. In all of them, the instrument admittedly conveyed a fee in the first instance, but it was claimed that this subsequent language restricted the use of the property and had the effect of causing the title to revert if some other use was shown.

Whether an instrument conveys an easement is a question different from the question of whether it conveys a fee, subject to a condition subsequent. The former is not a question of an attempt to subsequently limit the use of property which has admittedly been conveyed in fee, but the question in such case is—Does the instrument convey a fee?

Where a strip of land over and across a tract is conveyed for a right of way of a railroad, such a deed involves the right to use the strip, and does not present the question of a condition subsequent following the fee or a covenant to use land conveyed in fee for a particular purpose. The principles applicable to conditions subsequent and restrictive covenants differ from, and have no

application to, the principles applicable to instruments conveying easements. For this reason, the four Illinois cases above discussed and relied on by the District Court were inapplicable to the real issue involved in the Welker case, and are inapplicable to the question here involved.

In addition to these cases, petitioner cites *Rockford Trust Co. v. Moon*, 370 Ill. 250, 18 N. E. (2nd) 447. A mere glance at that case shows that it has no application to the deeds under consideration. There the grant was of a definitely described tract of land to a railroad company. Standing alone at the end of the deed and not in the granting clause were the words: "Growing out of the construction and operation of the railroad of said company, its successors and assigns." These words were meaningless and not part of the grant. The issue decided arose in a suit to quiet title after the land ceased to be used for railroad purposes. It was contended that the quoted words of the deed created a right of entry for condition broken or a possibility of reverter when the land ceased to be used for railroad purposes. In denying this contention the Court said (page 254):

> "Even where the deed contains words stating the consideration for or the purpose of the conveyance, they do not, of themselves, render an estate conditional * * *. The clause in the deed had no meaning whatever and stands alone."

The true question here involved is what in fact was the grant, not whether the grant was cut down by subsequent language. This distinction is so ably discussed by Judge Thomas in the opinion of the Court of Appeals of the Eighth Circuit in this case (R. 147-151; 152-153) that it seems unnecessary to say more on that point.

The Court of Appeals of the Seventh Circuit said that it did not agree with this very apparent distinction

pointed out by Judge Thomas, that while words, when used in a deed granting a fee, may be regarded as surplusage when it is claimed that they create a condition subsequent or a restrictive covenant, the same words, if used in a deed granting an easement, may constitute the essential description of the interest intended to be conveyed, and so cannot be regarded as surplusage but must be given effect.

Petitioner also says that he does not agree with this distinction. But neither petitioner nor the Court of Appeals of the Seventh Circuit even attempt to analyze the logic of Judge Thomas' reasoning on this point or to demonstrate wherein it is false, contenting themselves by saying that they do not agree with it, without citing any authority to the contrary.

That the Illinois authority is against petitioner is conclusively demonstrated by the decision in *Waller* v. *Hildebrecht*, 295 Ill. 116-118, where the Court did not hesitate to give effect to the words "to be used as an alley," and to hold that thereby an easement only was conveyed. (See opinion of Circuit Court of Appeals, R. 152-153.)

The case of *Weihe* v. *Lorenz*, 254 Ill. 195, 98 N. E. 268, is also cited by the District Court in the Welker opinion and relied on by petitioner. There the owner conveyed a portion of certain premises to Lorenz by metes and bounds and then the deed recited "and also give 10 feet adjoining on the north of said tract for alley purposes." Subsequently, the owner conveyed to Altmansberger a part of the lot described by metes and bounds, after which the deed recited: "I also give ten feet wide adjoining on the south of this tract, or the strip between this tract and the alley I gave in my deed of September 3, 1881, to John Lorenz for alley purposes." Altmans-

berger executed a mortgage without mentioning the 10-foot strip, which mortgage was foreclosed. An action in ejectment was brought by the one who succeeded to the title obtained through that action. The case was decided on the ground stated by the Court on page 197 of the opinion in the following words:

> "The appellant failed to show any title to the premises claimed, and *it will therefore be unnecessary to consider any other question.* Huegely conveyed the premises by his deed to Altmansberger. The latter omitted them from his mortgage. It is true that the description in the mortgage is followed by the words, 'being the same land conveyed to Henry Altmansberger by John Huegely and wife by warranty deed,' etc.; but that deed described two tracts while the mortgage described but one, and the effect of the words added was only to identify the tract described as being that mentioned in the deed, and not to enlarge the premises conveyed by the addition of another tract not previously described. The title, therefore, remained in Altmansberger and as Huegely had already conveyed it his subsequent deed to appellant was of no effect." (Italics ours.)

The Court then went on to say, by way of *dictum,* that even if the words "for alley purposes" referred to the conveyance to Altmansberger and not to that to Lorenz, they did not limit the estate granted, citing the above cases involving conditions subsequent, which manifestly have no application.

An analysis of the real decision in the Lorenz case shows why the Court of Appeals of the Eighth Circuit regarded that decision as of no controlling effect and why the Court of Appeals of the Seventh Circuit did not even refer to it in the opinion in the Welker case, and said that the Illinois Courts had not passed on the identical question here involved.

The quotation from *Walker* v. *Illinois Central*, 215 Ill. 610, 74 N. E. 812-814, appearing on page 27 of petitioner's brief, throws no light on the question of whether the deeds conveyed a fee or an easement. The Court there held that the deed conveyed an easement for a railroad right of way. Therefore, petitioner is incorrect in stating that the quoted statment in the Walker case is opposed to the conclusions of the Court of Appeals in the case at bar.

Public Policy Involved.

The Illinois cases heretofore discussed do not support the District Court's ruling in the Welker case, or the contention of the petitioner here, for another reason. Those cases all dealt with lands in compact form and not in gores or strips. The reasoning applicable to cases involving strips conveyed to railroads for right of way purposes across large tracts of land is not applicable to cases dealing with land in compact form. In the latter case public policy leans to a conveyance in fee, but where gores or strips are conveyed, public policy leans to the conveyance of an easement only. It requires no argument to point out that difficult situations may result in the event a fee to a narrow strip of land is in one party and the fee to the bordering property is in another.

In the case of *Paine* v. *Consumers' Forwarding & Storage Co.*, 71 Fed. (C. C. A. 6th) 626-632, it was said:

> "The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots."

See, also, the cases of *Shell Petroleum Corp.* v. *Hollow, et. al.*, 70 Fed. (2nd) (C. C. A. 10th) 811-814, and *Barker* v. *Lashbrook*, 128 Kansas, 595, 279 Pac. 12-14.

As was stated in the case of *Bowers* v. *Atchinson, T. & S. F. Ry. Co.*, 119 Kans. 202, 237 Pac. 913-914:

> "Experience revealed that separate ownership of long narrow strips of land distinct from the territory adjoining on each side, was prolific of private dispute and public disturbance, and public policy became an important factor in the interpretation."

In the case of *Gebhardt* v. *Reeves*, 75 Ill. 301-307, the Court, in applying a somewhat similar rule, said:

> "No doubt the rule, in its practical operations, subserves the public good by preventing the existence of strips of land of no great value, formerly a part of the highway, but on the abandonment of which would induce profitless and vexatious litigation. 3 Kent, 433."

It follows, therefore, that the Illinois cases relied upon by the Court in the Welker case and by the petitioner here, even if they supported the propostions for which they are cited, are distinguishable on the different public policy involved in the construction of a deed of a compact tract of land to a railroad for general railroad purposes, and a deed conveying a strip of land for right of way purposes.

This distinction is well illustrated in the case of *Danielson* v. *Woestemeyer*, 131 Kans. 796, 293 Pac. 507-511. In that case the grantor conveyed a strip of land 100 feet wide through his premises for right of way purposes. In the same deed he conveyed another tract adjacent to the right of way strip for general railroad purposes. The Court concluded that the railroad acquired only an easement in the right of way strip, but took a fee simple title

to the adjacent tract conveyed for general railroad purposes.

It is argued by petitioner that this question of public policy is not a factor if the deeds here be construed to have conveyed a determinable fee. (Br. 30.) The fallacy of this argument is that the deeds here before the Court cannot under any theory be construed as conveying a determinable fee because there is no language used in the deeds which can be construed either as a condition subsequent or a restrictive covenant, under Illinois authority, as will be shown hereafter under Point III. Therefore, to carry out this public policy, the deeds must be construed as conveying only easements.

Decision Here Under Review Is in Accord With Weight of Authority.

The decision in the Welker case and the contention of petitioner is also out of harmony with the overwhelming weight of opinion in other jurisdictions. This is conclusively demonstrated by the opinion of the Circuit Court of Appeals of the Eighth Circuit. In that opinion, the Court of Appeals collates the authorities pro and con, and there demonstrates that the weight of authority supports respondents' contention. (R. 153-154.)

For the convenience of the Court in testing the respondents' assertion that the weight of authority is contrary to the contention of petitioner, we have briefly summarized various cases holding that an easement rather than a fee was granted by the deeds therein construed.

*(1) "A strip of land measuring fifty (50) feet each way from the line of said railroad," etc.

*(1) *Alabama Great So. R. Co.* v. *McWhorter*, 202 Ala. 455, 80 So. 839.

*(2) "All of that certain lot or parcel of land * * * described as follows" (here appears description by metes and bounds) "* * * for the purpose of granting * * * a right of way."

*(3) "For public use as a highway, street or road, a strip of land sixty feet in width."

*(4) "A strip of land for a road 15 feet in width."

*(5) "All the lands * * * lying within fifty feet of the center line of the main track" etc.

*(6) "A strip of land * * * for right of way purposes."

*(7) A "strip of land one hundred feet wide * * * being the route or right of way of the railroad."

*(8) A "strip, tract or parcel of land for railroad right of way" * * * "100 feet in width, being 50 feet on each side of the center line of the Kentucky River Coal and Coke Company's railroad."

*(9) A specific description of land "containing 9.68 acres more or less. Said tract of land herein described is sold and conveyed for railroad purposes only * * *."

*(10) A deed conveying the locus upon which new track had been constructed as a strip of land sixty feet in width which was to be used "for railroad purposes only."

*(11) Certain described portions of "lots three and four * * * such portions of lots three and four * * * to be used for a track."

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*(2) *Parks* v. *Gates*, 186 Cal. 151, 199 Pac. 40.

*(3) *Forgeus* v. *Santa Cruz County*, 24 Cal. App. 193, 140 Pac. 1092.

*(4) *Smith* v. *Holloway*, 124 Ind. 329, 24 N. E. 886.

*(5) *Abercombie* v. *Simmons*, 71 Kan. 538, 81 Pac. 208.

*(6) *Roxana Petroleum Corp.* v. *Jacpis*, 127 Kan. 365, 273 Pac. 661.

*(7) *Danielson* v. *Woestemeyer*, 131 Kan. 796, 293 Pac. 507.

*(8) *Sherman, et al.* v. *Petroleum Exploration, et al.*, 132 S. W. (2nd). (Ky.) 768.

*(9) *Noel Estate* v. *K. C. S. & G. Ry. Co.*, 187 La. 717, 175 So. 468.

*(10) *Fitchburg R. R. Co.* v. *Frost*, 147 Mass. 118, 16 N. E. 773.

*(11) *Chi. Great West. Ry. Co.* v. *Zahner*, 145 Minn. 312, 177 N. W. 350.

*(12) Certain described property to have and to hold the same for so long as it should be used for right of way for tracks.

*(13) Certain described land "said tract of land hereby conveyed to be forever held and used as a public park."

*(14) Deed in usual form to convey a fee with full covenants of warranty reciting "as and for a right-of-way for said railway" appearing before the granting clause and preceding the description.

*(15) "A strip of ground fifty (50) feet in width for right of way for said railroad, over and across the following described tract of land" (describing same).

*(16) A certain strip of land one-hundred feet wide across certain lands described by government subdivision "to have and to hold the same unto the said railroad company, its successors and assigns."

*(17) "A strip of land ten feet in width on the northerly side of and adjacent to the land of the railroad and also a strip of land fifteen feet in width on the southerly side of and adjacent to said lands" of the railroad, said strips to be used for right-of-way purposes.

*(18) A parcel of land for road purposes "the said strip of twenty feet and herein conveyed for road as above stated, is to be enclosed."

*(19) "The following described land * * * being a strip sixty-six feet wide through the following described lands" (describing them).

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*(12) *Norton* v. *Duluth Transfer Ry. Co.*, 129 Minn. 126, 151 N. W. 907.

*(13) *Flaten* v. *City of Moorhead*, 51 Minn. 518, 53 N. W. 807.

*(14) *State* v. *Griffith*, 114 S. W. (2nd) (Mo.) 976, 977.

*(15) *K. C. So. Ry. Co.* v. *Sandlin*, 173 Mo. App. 384, 158 S. W. 857.

*(16) *Blakely* v. *Chicago, K. & N. R. Co.*, 46 Neb. 272, 64 N. W. 972.

*(17) *People, ex rel. N. Y. C. & H. R. R. Co.* v. *Walsh*, 211 N. Y. 90, 105 N. E. 136.

*(18) *Wason* v. *Pilz*, 31 Ore. 3, 48 Pac. 701.

*(19) *City of Knoxville* v. *Phillips*, 162 Tenn. 328, 36 S. W. (2nd) 434-436.

*(20) "Sell and convey * * * for road and water purposes all the following described tracts" (describing them).

*(21) "Sell and convey * * * for the purpose of constructing, operating and maintaining its railroad, the right-of-way 200 feet in width, over and upon the above described tract of land; together with the right to take and use all the timber, earth, stone and mineral existing or that may be found within the right-of-way hereby granted."

*(22) A certain strip of land "for the use of a plank-road."

*(23) Warranty deed to forty acres "reserving and excepting therefrom, however, a strip of land extending through the same * * * of the width of four hundred feet,—that is, two hundred feet on each side of the center line of the Northern Pacific Railroad, or any of all its branches,—to be used for a right of way and other railroad purposes."

The foregoing conclusively establishes that the ruling of the Court of Appeals that the deeds in question granted petitioner's predecessor in title only an easement for railroad purposes was correct and in harmony with applicable Illinois authority and the great weight of authority in other jurisdictions.

III.

The deeds in question do not convey a base, qualified or determinable fee.—

Petitioner claims that if the language "for right of way" be construed as a condition or limitation, the con-

*(20) *West Texas Utilities Co.* v. *Lee*, 26 S. W. (2nd) (Tex. C. A.) 457.

*(21) *Right of Way Oil Co.* v. *Gladys City Oil, Etc. Co.*, 106 Tex. 94, 157 S. W. 737.

*(22 *Robinson* v. *Missisquoi R. Co.*, 59 Vt. 426, 10 Atl. 522.

*(23) *Biles* v. *Tacoma O. and G. H. R. Co.*, 5 Wash. 509, 32 Pac. 211.

veyance would not necessarily be an easement, but rather a base, qualified or determinable fee. The fallacy of this argument is that the language "for right of way," which appears in the granting clause preceding the section description, is not a condition or limitation on the grant of a fee, but is a description of the estate granted, so that only an easement is conveyed.

In fact, the very Illinois cases cited and so strongly relied upon by petitioner show that the deeds in question cannot be construed to convey a base, qualified or determinable fee. Under Illinois law if the words "upon condition" are not used and there is no provision for right of re-entry for condition broken, there is nothing to indicate an intention to create a base or determinable fee, and therefore the deeds cannot be given that effect.

For instance, the quotation from the case of *Tinker* v. *Forbes*, 136 Ill. 221, 26 N. E. 503, appearing on pages 17 and 18 of petitioner's brief, shows that the words "for right of way" cannot constitute a condition, as there is no provision for re-entry for condition broken, nor can such language be construed as a restrictive covenant. To the same effect is *Downen* v. *Raybuck*, 214 Ill. 342, 73 N. E. 364, also relied upon by petitioner.

Therefore, the only way by which said words can be given effect is to construe the conveyance as creating an easement, which is the proper construction in this case.

This contention that the deeds convey a determinable fee, as appears from the foregoing cases, is not predicated upon Illinois law. The Illinois law is that a conveyance to a railroad for a right of way is an easement. Petitioner can cite no case of the Illinois Courts holding that a conveyance "of a railroad right of way" or "to a railroad for right of way" conveys a determinable fee. The only Illinois law on the subject is to the contrary.

In the case of *Branch* v. *Central Trust Co.*, 320 Ill. 432-442, where a railroad right of way was conveyed, it was expressly held that in Illinois a grant of a right of way to a railroad company does not convey a fee, but only conveys an easement.

As a matter of fact, the only Illinois case cited by petitioner on this point (Br. 22) is that of *Chicago and Mississippi Railroad Company* v. *Patchin*, 16 Ill. 198, which negatives any such contention. We quote the very portion of this decision relied upon by petitioner (P. 202):

> "I presume the right to the land upon which railroads are built, is not strictly analogous to the easement of the public in highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee *for railroad purposes.*"

"For railroad purposes" means the exclusive use for the operation of a railroad. No one could reasonably contend that a railroad purpose includes the exploration, drilling and marketing of oil and gas.

This, likewise, is the theory of this Court as appears from the case of *Western Union Telegraph Co.* v. *Penn. R. Co.*, 195 U. S. 540-570, cited by petitioner at page 22 of his brief. Petitioner, however, does not quote enough to indicate what this Court meant when it stated that railroad right of way was more than an easement. On that same page this Court cites with approval the case of *Philadelphia and R. R. Co.* v. *Hummell*, 44 Pa. 375, 84 Am. Dec. 457, where it is said of a railroad right of way:

> "It is 'a fee in the surface and so much beneath it as may be necessary for support * * *.'"

This sentence indicates what was meant by this Court in that case. That is, that a railroad may own the fee in the surface of its right of way plus as much beneath the surface as may be necessary for the support thereof.

Surely, no one would contend that it is necessary for the support of the surface of a railroad right of way that the railroad company shall also own and have the right to remove and sell the oil and gas thereunder. When properly analyzed, *Western Union Telegraph Co.* v. *Penn. R. Co. supra,* is no authority on the issue of who owns the oil and gas beneath the railroad right of way here involved.

The case of *Walker* v. *I. C. R. R. Co.*, 215 Ill. 610, 74 N. E. 812-815, quoting from the case of *Hazen* v. *Boston and Maine R. R. Co.*, 2 Gray 574-580, states the following:

> "'The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive'."

This language explains clearly that what is meant by the Courts when they state that a railroad easement is not strictly analogous to the easement in public highways, namely, that the use of the surface for railroad purposes is exclusive in favor of the railroad company.

Petitioner also cites *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44-47, and *Kern River Co.* v. *United States*, 257 U. S. 147-151. These cases involved a right of way acquired by a railroad by proceeding in the land department under a Statute of the United States. It was held that under the true effect of this Act, a fee simple title on an implied condition of reverter was granted to the railroad. The decisions depended wholly on the meaning of the Statute, and not upon the construction of a deed, and have no application here.

The fallacy of petitioner's claim that these deeds convey a base, qualified or determinable fee, rather than an easement, is further pointed out in the opinion of the Court of Appeals in this case. (R. 151-152.)

Respondents assume that this Court will be guided by the declared law of Illinois and that it will not, by its opinion, create an estate not heretofore sanctioned by the Illinois Courts, and particularly where the admitted reason is to give to the petitioner an interest and rights that petitioner's predecessor in title never contracted for, namely, the oil and gas underlying the right of way.

We quote from petitioner's brief at page 30:

> "As forecast above, however, we do not concede that an easement affords substantially the same right as would be accorded by a base fee conditioned on use for railroad right of way, if for no other reason than because this latter conveyance would give grantee the oil and mineral rights pending the contingency upon which possibility of reverter depends, while an easement would accord the mere right of limited use without the right of profit from the minerals."

This is a bald statement of the purpose of such a contention. We respectfully suggest to the Court that the farmers who made this grant intended no such consequences. Every one of those original grantors, their heirs or their grantees, have a direct and substantial interest in this case, in that, under leases upon which respondents' rights are predicated, these original grantors, their heirs or grantees, have a right to royalties which are of substantial value.

Neither under Illinois law nor under the equities of the situation is such a construction permissible.

IV.

If it be held that petitioner has only an easement, the Bankruptcy Court had no jurisdiction to enter the order adjudicating adverse claims to property not in the possession of the Trustee, and said entire order was wholly void, including the authorization to petitioner to drill wells on said premises to be paid for out of the proceeds of the oil.

Petitioner, under Point II of his brief, argues that if this Court be of the opinion that petitioner has no more than an easement for railroad purposes in the property in question, and hence had neither actual nor constructive possession of the oil underlying the right of way and no right to it, the Bankruptcy Court nevertheless had jurisdiction to enter orders authorizing the Trustee to drill for oil, sell the same, impound the proceeds, and to pay the net, after deducting the cost of the wells drilled, to the parties entitled thereto.

The implications of this argument are astounding in view of the ruling of this Court in *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox, et al.*, 264 U. S. 426. The very premise of the argument, as appears from page 34 of petitioner's brief, is that the Trustee, when he applied summarily to the Bankruptcy Court to determine adverse claims, had neither actual or constructive possession of the property. Despite this premise it is argued that the Court may nevertheless, under such circumstances, have jurisdiction to enter collateral orders. Such a contention is not supported by any authority and in fact is negatived by the ruling of this Court in the *Taubel-Scott-Kitzmiller Co. Inc.* case.

This Court, in that case, specifically pointed out that

the summary jurisdiction of a Bankruptcy Court is limited to a situation in which the Trustee has actual or constructive possession of the property to which there are adverse claims unless jurisdiction is otherwise acquired by consent. In the instant case, from its inception, respondents have contended that the Bankruptcy Court had no jurisdiction in that the Trustee was not in actual or constructive possession of the property, because the deeds upon which the jurisdiction, if any, was predicated, granted no more than an easement.

Once it is assumed that the Trustee was not in actual or constructive possession of the property, which is petitioner's assumption in the second part of his brief, then the basis of jurisdiction to entertain this summary proceeding has disappeared and it is a proceeding without a jurisdictional foundation.

The Court of Appeals reached this same conclusion when it decided that the deeds conveyed no more than an easement. It, therefore, found that the Bankruptcy Court was without jurisdiction; that is, the determination of the proper construction of the deeds also determined the question of jurisdiction. All facts necessary to determine the jurisdiction appeared on the face of the petition. It, therefore, follows that under such a construction of the deeds, the Bankruptcy Court was acting without jurisdiction and all of its orders were void and in excess of and beyond its jurisdiction.

The Court of Appeals further pointed out that if such be the proper construction of the deeds, the action of the District Court, in appointing a receiver *pendente lite*, when the lack of jurisdiction was apparent on the face of the petition, was not only void, but an abuse of discretion, and cited in support thereof substantial and persuasive authority, not only of this court but of other Circuit Courts of Appeals.

On this the Court below ruled as follows (R. 155):

> "Counsel for appellee in their briefs argue that even conceding that the court was without jurisdiction to determine title to the mineral and oil rights because the Trustee was not in actual or constructive possession, that part of the order appointing a receiver *pendente lite* with authority to take possession, drill wells and extract and sell the oil was not an abuse of discretion. It cannot be said that the appointment of a receiver under such circumstances is not erroneous nor that if he takes possession from the owner under such a void appointment that his act is not wrongful. Compare: *Buturite Coal Co.* v. *Riggs*, 274 U. S. 208; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 640; *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360; *United States* v. *Stone*, 7 Cir. 187 Fed. 577; *Noxon Chemical Products Co.* v. *Leckie*, 3 Cir. 39 F. (2d) 318; *W. F. Potts Son & Co.* v. *Cochrane*, 5 Cir. 59 F. (2d) 375; *Beach* v. *Macon Grocery Co.*, 5 Cir. 125 Fed. 513; *In re Forty-one Thirty-six Wilcox Bldg. Corp.*, 7 Cir., 100 F. (2d) 588."

The foregoing ruling is particularly appropriate in this case. Under the facts as they appear from the record below, there were approximately 10,000 barrels of oil per acre lying beneath the eight acres covered by the right of way in controversy. This would amount to about 80,000 barrels of oil and would be worth approximately $80,000, but, because wells drilled on the right of way would draw oil from surrounding territory, petitioner's experts testified that the Trustee expected to recover approximately 400,000 barrels of oil. (R. pp. 109-111.)

Petitioner here in his statement of facts goes outside the record to point out that petitioner has recovered in excess of $472,000 worth of oil.

Obviously, if petitioner's experts are correct, all of this oil could not have been located under the right of way. This sum of $472,000 represents oil to which respondents

and others are entitled, and royalties to which respondents' lessors are entitled. Nevertheless, petitioner, under such a hypothesis, would have this Court sanction drilling operations conducted under a void order of Court, where oil has been recovered from property outside the right of way and under lease to respondents.

This argument of petitioner, in its final analysis, is to the effect that even though petitioner had no more than an easement, and even though petitioner, as a Trustee in Bankruptcy, had neither actual nor constructive possession of the oil, yet he, under protection of a Court of Bankruptcy, may drill a number of wells on the right of way and recover and sell oil not only from property, the title to which is in dispute, but from other property admittedly belonging to other parties and under lease to respondents.

In other words, no risk and all gain at the expense of the other party's property. No bond was posted and respondents in the Bankruptcy Court were enjoined and forced to sit by while these operations were carried on. These operations were carried on with the Trustee being fully cognizant of the respondents' claim.

If respondents are correct, there could be no more inequitable way of depriving them of their property than by the order entered by the Bankruptcy Court, which in effect forces them out of their own property to pay in excess of $200,000 for wells which they did not drill and did not need.

In an attempt to justify this position, petitioner cites a group of cases on pages 35 to 39 of his brief. The Bankruptcy cases cited are distinguishable from the instant case, in that the want of jurisdiction did not appear on the face of the summary petition. (*Irving Trust Co.* v. *Wieser Products Corp.* 71 Fed. (2d) 681.)

The other federal cases announcing the rule that a Bankruptcy Court has the jurisdiction, as a preliminary inquiry, to determine its own jurisdiction to examine the merits of an adverse claim are inapplicable, in that the Bankruptcy Court, in this instance, exercised that very right, and under the hypothesis of this portion of petitioner's brief, decided it wrongfully.

The other cases, such as *Malone* v. *Barnett*, 87 S. W. (2d) (C. C. A. Tex.) 523, and *State of Oklahoma* v. *State of Texas*, 252 U. S. 372, were plenary suits and the courts in those cases were exercising a jurisdiction of a quality and character different from the summary jurisdiction of a bankruptcy court. The limited character of this jurisdiction has been defined by this Court in the case of *Taubel-Scott-Kitzmiller Co. Inc., supra.*

If the deeds in question conveyed to the Trustee no more than an easement for railroad purposes, then the Bankruptcy Court in this summary proceedings was acting in excess of and beyond its jurisdiction and all of its orders and its decision were void, including the appointment of a receiver *pendente lite*, and by appropriate subsequent proceedings the respondents will be entitled to such remedy as the law affords for the loss of their property under such circumstances.

CONCLUSION.

It is respectfully submitted that the writ of certiorari was improvidently issued in this case and should be dismissed.

If, however, this court be of a contrary opinion, respondents maintain that the Court of Appeals properly held, in accordance with applicable Illinois decisions on the construction of deeds and the overwhelming weight of authority elsewhere, that the deeds to the Railroad Company conveyed only a railroad right of way easement, so that the grantee acquired no rights in and to the oil and gas underlying this property.

Furthermore, the Court of Appeals properly decided that, since the property involved was not in the actual or constructive possession of the Trustee, the Court had no jurisdiction, without consent of the parties, to adjudicate adverse claims to the title to the property or to authorize the Trustee to take possession of and drill wells on said property and extract and sell the oil therefrom.

Therefore, the judgment of the Circuit Court of Appeals of the Eighth Circuit should be in all respects affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee), Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant), Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee), Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant), Respondent.

PETITION FOR REHEARING AND RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

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GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee), Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant), Respondent.

PETITION FOR REHEARING AND RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

Comes now Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, Petitioner, by counsel, and presents this, his motion for rehearing and reconsideration of petition for writ of certiorari, and in support thereof respectfully shows:

The decision of the Circuit Court of Appeals of the Eighth Circuit in the *Magnolia case* here sought to be reviewed and the decision of the Circuit Court of Appeals

of the Seventh Circuit in *Carter Oil Company v. Welker* (which will be found printed as "Exhibit A" to Petitioner's Supplement to Petition for Writ of Certiorari) are diametrically opposed respecting the construction to be given certain Illinois deeds conveying "*a strip of land for railroad right of way,*" the Circuit Court of Appeals of the Eighth Circuit in the *Magnolia case* holding that with due regard to the Illinois decisions such a deed conveys a mere railroad easement, whereas the Circuit Court of Appeals for the Seventh Circuit in the *Carter Oil Company case,* following the Illinois decisions, has construed substantially the same language as conveying fee-simple, absolute title to the railroad company.

The decision of the Circuit Court of Appeals of the Eighth Circuit sought to be reviewed involved the title to only a portion of section 20. Similar controversies respecting oil rights underlying the right of way in section 16, a part of section 20, and section 21, have been awaiting the outcome of these decisions. It has been estimated that the oil rights involved in these additional controversies will exceed $500,000. According to newspaper reports, a 10,000 barrel per day well from a heretofore totally unexplored strata has just been brought in adjacent to one of these tracts, which, according to newspaper accounts (which we believe to be correct), will make the field in question one of the richest, if not the richest, in the United States. And we now believe that the estimates as to the value of the oil under the right of way involved in the aforesaid not yet determined controversies have been greatly underestimated.

By reason of this Court's denial of the petition for certiorari, petitioner is now immediately confronted with the following intolerable situation, to wit:

Oil is being drained from under the right of way, and every day's delay means an enormous loss if petitioner

should be ultimately held to have fee simple absolute title to the tracts of land not immediately involved in the Magnolia appeal. If the adverse claimants are able to so maneuver these controversies as to have them adjudged in the Eighth Circuit, the *Magnolia decision* here sought to be reviewed will presumably be followed, whereas if the litigation can be determined in the federal court of Illinois, the diametrically opposed *Carter Oil Company decision* of the Seventh Circuit will be followed.

Petitioner is therefore confronted with the intolerable situation where title to oil rights involving in excess of a half million dollars will depend entirely on whether the litigation can be forced to trial in the United States District Court at St. Louis, Missouri, or in the United States District Court in East St. Louis, Illinois.

Surely, in the face of this direct conflict of the decisions of different circuits, the great loss that will result from delay, and the fact that substantial property rights must be immediately determined under one or the other of these conflicting decisions justifies a reconsideration of this Court's order denying petition for certiorari.

Wherefore, petitioner respectfully but most seriously and earnestly urges the granting of this motion and the reconsideration of petitioner's petition for writ of certiorari and supplement to petition for writ of certiorari heretofore timely filed in this proceeding.

Respectfully submitted,

GUY A. THOMPSON,
Trustee, Missouri-Illinois Railroad Co., Debtor,
Petitioner,

By RUSSELL L. DEARMONT,
THOS. T. RAILEY,
Attorneys for Petitioner.

Certificate of Counsel.

I, Thos. T. Railey, attorney for the above-named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Thos. T. Railey,
Attorney for Petitioner.

P. 3

SUPREME COURT OF THE UNITED STATES.

No. 481.—October Term, 1939.

Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, Petitioner,
481 *vs.*
Magnolia Petroleum Company and The Ohio Oil Company, Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 25, 1940.]

Mr. Justice Black delivered the opinion of the Court.

A rich oil field was discovered in Illinois in 1938. Thereupon, this dispute arose between a trustee of a railroad in reorganization under Sec. 77 of the Bankruptcy Act (11 U. S. C. 205) and other claimants as to the legal right to drill for and capture fugitive oil under the railroad's right of way traversing the newly discovered field. The trustee asserts fee simple ownership of the right of way lands with consequent right to reduce the underlying oil to possession. Respondents deny the trustee's alleged title or that he has any interest in the land beyond a mere easement—a limited right to use the surface for railroad purposes only. They allege that ownership of the fee is in others, from whom they have obtained oil leases. This determinative question of fee simple ownership can be decided only by interpretation, under Illinois law, of instruments granting the railroad its right of way.

The questions here are whether the bankruptcy court has summary jurisdiction to adjudicate ownership of the right of way lands, and whether that court abused its discretion in ordering the fugitive oil captured and its proceeds impounded pending adjudication of the ownership.

Petitioner is trustee of the Missouri-Illinois Railroad Co., a subsidiary of the Missouri-Pacific Railroad Co., in process of reorganization in the same proceeding with the parent company in the United States District Court for the Eastern District of Missouri. The trustee petitioned the bankruptcy court " . . . for deter-

mination of title and for advice and directions respecting certain proposed oil operations on right-of-way near Salem, Illinois." And his petition alleged that the right of way lands had been "fenced and used by Trustee and his predecessors in interest without interruption, and with actual visible and exclusive possession acquired under claim of title inconsistent with the claims of title of any other owner for at least twenty years prior to institution of these proceedings"; that by reason of this adverse possession and various conveyances and decrees of record, the trustee had title to the lands and a right to the oil thereunder; that numerous wells had been dug in close proximity to the right of way and without prompt action to remove the oil under the right of way it would be drained into wells on adjacent lands and its value forever lost to the stockholders and creditors of the railroad. The prayer sought notice to claimants of rights to the oil to appear and show cause why they should not be "estopped and enjoined from asserting any further title in and to the lands . . . . upon which said right-of-way is located or to the mineral, oil or gas deposits in and under . . . [the] right-of-way or extracted therefrom"; and that, pending "determination of adverse claims to title", the trustee be authorized to have wells drilled, oil captured and sold, and the proceeds, less cost of production, impounded and held for the account of the rightful owner as might be thereafter determined by the bankruptcy court.

Although they admitted that the railroad "had been in possession of the . . . premises" using them for right of way and tracks, respondents denied both that the trustee owned the fee and that the railroad had been, or that the trustee was, in adverse possession of the oil and other minerals under the right of way.

The bankruptcy court found that the trustee was in "actual possession of the property . . . . under assertion of claim to fee simple title thereto"; that the court accordingly had jurisdiction; and that immediate action was necessary "to conserve the oil supply underlying the property for the benefit of the parties in interest as their rights, title, and interest thereto may hereafter be determined by this Court." The trustee was therefore directed to provide for wells, production and sale of oil, with the proceeds—less expenses—to be impounded pending adjudication of ownership.

Upon consideration of Illinois law, which admittedly must govern, the Court of Appeals reversed with instructions to dismiss the trustee's petition, concluding that, as interpreted under Illinois law,

the instruments relied on by the trustee conveyed an easement only and that the trustee's possession of the right of way lands under an erroneous claim of fee simple ownership was not such possession of the oil and gas as to give the bankruptcy court summary jurisdiction to determine fee simple ownership.[1] Conveyances of rights of way in Illinois substantially similar to those here in dispute have been held by the Court of Appeals for the Seventh Circuit, in which Illinois is located, to convey a fee simple title under that State's law.[2] Because of this conflict and the importance of the question of the bankruptcy court's asserted summary jurisdiction, we granted certiorari.[3]

First. Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy.[4] Here, the trustee succeeded to the physical possession, custody and control of the right of way lands which the railroad had enjoyed at the time of bankruptcy. In fact, however, no one had, when the petition was filed, physical possession of the fugitive oil apart from the lands under which it lay. The Supreme Court of Illinois has said, "The grant of oil and gas is a grant of such oil and gas as the grantee may find, and he is not vested with any estate in the oil or gas until it is actually found."[5] And this entire controversy can only be resolved by solution of the primary question of fee simple ownership. The parties agree that if ownership of the right of way lands is in the trustee he has the right to capture the underlying oil, and if not, that the trustee has no such right. Thus, the right to the disputed oil necessarily hinges upon where the ownership of the fee to these lands lies. And possession of those lands under claim of fee simple ownership by the railroad and later by the trustee was an adequate basis for the District Court's summary jurisdiction. As previously determined in litigation involving another aspect of this same reorganization, the jurisdiction thus acquired by the bankruptcy court

1 106 F. (2d) 217.

2 Carter Oil Company v. Welker et al., — F. (2d) —.

3 — U. S. —.

4 Harris v. Avery Brundage Co., 305 U. S. 160, 162, 163 and notes 4, 5 and 6.

5 Poe v. Ulrey, 233 Ill. 56, 62.

"extends . . . to the adjudication of questions respecting the title." *Ex Parte Baldwin*, 291 U. S. 610, 616.

Second. We are of opinion that it was not an abuse of discretion for the bankruptcy court to authorize the trustee to protect all interests—so far as it appeared possible to do so—by preserving the oil, from waste and depletion, through its extraction and sale with the net proceeds to be impounded until final determination of the controversy over title to the right of way lands.[6]

The verified petition and supporting evidence offered a basis for the District Court's finding that such steps were necessary to protect the estate's possible interest in the oil under the right of way. No other method has been suggested whereby such protection against irreparable loss to the estate of the wandering and vagrant oil[6] could have been better afforded. The " . . . malleable processes of courts in bankruptcy give assurance of a remedy that can be moulded and adjusted to the needs of the occasion." *Steelman* v. *All Continent Co.*, 301 U. S. 278, 290.

Third. A court of bankruptcy has an exclusive and nondelegable control over the administration of an estate in its possession.[7] But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to State courts of particular controversies involving unsettled questions of State property law and arising in the course of bankruptcy administration.[8] And, under the circumstances of this case, we conclude that it is desirable to have the litigation proceed in the State courts[9] of Illinois.[9] An order to the trustee to proceed in the Illinois courts for a decision on the ownership of the fee to the right of way lands will be comparable to one in which the bankruptcy court, preserving the status quo the while, orders a trustee to determine in a plenary State court suit the legal right to property alleged by the trustee to have been fraudulently transferred by the bank-

[6] See Poe v. Ulrey, supra, 62.

[7] Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734.

[8] *Id.*, 739; see, In re Schulte United, Inc., 49 F. (2d) 264; see, e.g., Foust v. Munson Lines, 299 U. S. 77 (bankruptcy court's denial of permission for suit in admiralty against debtor in 77(b), held abuse of discretion); Texas v. Donoghue, 302 U. S. 284 (refusal of permission for a State to try in a State court its claim—based on alleged forfeiture—to oil held by trustee in 77(b), abuse of discretion.) 5 Remington on Bankruptcy, 4th Ed., §§ 2045, 2370.

[9] Cf. Ex parte Baldwin, *supra*, 619.

rupt.[10] Decision with which the Federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme.[11]

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed except insofar as it provides for adjudication of the disputed ownership in the bankruptcy court. The cause is remanded to the District Court with instructions to modify its order so as to provide appropriate submission of the question of fee simple ownership of the right of way to the Illinois State courts.

Reversed and Remanded.

Mr. Justice McREYNOLDS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[10] Cf. Steelman *v.* All Continent Co., 301 U. S. 278. See Scott *v.* Gillespie, 103 Kans. 745, cert. den. 249 U. S. 606 (trustee ordered into State court for construction of will to determine estate, if any, taken thereunder by bankrupt).

[11] Cf. Erie R. Co. *v.* Tompkins, 304 U. S. 64.